Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PETROCHEM INSULATION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, as suggested by the District of Columbia and Ninth Circuit Courts of Appeals, the National Labor Relations Board and some courts of appeals have erred by eliminating First Amendment protection for lawsuits which although not objectively baseless, are ultimately unsuccessful, when to do so is contrary to this Court's decision in *Professional Real Estate Investors v. Columbia Pictures Industries,* 508 U.S. 49 (1993) and in stark contrast to the First Amendment protection afforded such lawsuits under other statutes.

2. Whether the National Labor Relations Board and the court of appeals erred in ruling, contrary to the explicit language of this Court in *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), that union environmental permit extortion activities are protected by Section 7 of the National Labor Relations Act, when those union activities are unrelated to the protected interests or activities of identifiable "employees" within the meaning of the National Labor Relations Act.

3. Whether the National Labor Relations Board's authority to remedy violations of the National Labor Relations Act extends to awarding attorneys' fees from prior litigation to the prevailing party, in apparent conflict with this Court's ruling in *Summit Valley Industries, Inc. v. United Bhd. of Carpenters & Joiners,* 456 U.S. 717 (1982) and the "American Rule" on the award of attorneys' fees.

LIST OF PARTIES TO PROCEEDINGS IN THE COURT OF APPEALS

The Petitioner in this case is Petrochem Insulation, Inc. ("Petrochem"). Petrochem Insulation, Inc. is a California corporation primarily engaged in the business of installing, repairing, and removing thermal insulation in commercial and industrial construction. Petitioner is not related to any other publicly held or publicly traded companies.

Respondent in this case is the National Labor Relations Board ("NLRB").

Intervenors in this action before the court of appeals were the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, Locals 62, 159, 228, 246, 342, 343, 350, 393, 442, 447, 467, 483.

LPA, Inc. and Associated Builders and Contractors, Inc. participated before the court of appeals as *amici curiae* in support of Petrochem.

CORPORATE DISCLOSURE STATEMENT

Petrochem Insulation, Inc. is a privately held California corporation. It has no parent corporation, there is no publicly held company that holds 10% or more of its stock, and it has not issued shares or debt securities to the public.

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STATEMENT OF RELATED CASES

There is no related case.

DECISIONS BELOW

The proceedings below are officially reported as follows:

1. *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26 (D.C. Cir. 2001), *reh'g en banc denied* (April 16, 2001). The opinion appears at pages App. 1 to App. 20 of the Appendix.

2. *Petrochem Insulation, Inc.*, 330 N.L.R.B. No. 10 (1999). The opinion appears at pages App. 21 to App. 41 of the Appendix.

JURISDICTION

On November 19, 1999, the National Labor Relations Board ("Board") issued its Decision and Order, *Petrochem Insulation, Inc.*, 330 N.L.R.B. No. 10 (1999) (App. 21 to App. 41). A petition seeking review of that decision by the United States Court of Appeals for the District of Columbia Circuit was timely filed. The Court of Appeals issued its decision on January 26, 2001 (App. 1 to App. 20), and denied a petition for rehearing *en banc* on April 16, 2001 (App. 95 to App. 96). Petitioner seeks review of the opinion and judgment entered by the United States Court of Appeals for the District of Columbia Circuit. The

Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (App. 97), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The full text of Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, is reproduced in the Appendix at App. 97 to App. 109. Section 8(a)(1) of the Act provides:

> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . .

Section 8(b)(4), 29 U.S.C. § 158(b)(4), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents –
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title . . . .

The full text of Section 10 of the National Labor Relations Act, 29 U.S.C. § 160, is reproduced in the Appendix at App. 110 to App. 119. In relevant part, it provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in

> or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

STATEMENT OF THE CASE

Petrochem is engaged in construction and maintenance work in the installation, repair and removal of thermal insulation, primarily in commercial and industrial applications. It is headquartered in, and much of its work is performed in, California.

In the 1980's, local unions in California, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, began a campaign of filing objections to environmental, zoning, and other construction-related permits sought by non-union developers for the construction of various industrial plants and facilities. None of these owners was an employer in the construction industry, within the meaning of Sections 8(e) and 8(f) of the National Labor Relations Act (hereinafter "NLRA" or "Act"), 29 U.S.C. § 158. The unions would embroil the developer in permit disputes, delaying and greatly increasing the cost of the project, thereby coercing the developer to use only union-signatory construction contractors.

As a result of this union permit extortion campaign, several developers, clients of Petrochem, seeking to avoid or end union permit protests, informed Petrochem that it could neither bid for nor perform work on their impending construction projects. In each case, Petrochem was advised by the developer that it would not be allowed to bid the project or would not be awarded the project because the developer, in order to avoid union interference in permit proceedings, had agreed to use only union contractors. In each case, Petrochem had previously been invited to bid on the project by the client; in one case, Petrochem had already bid the project and in another, Petrochem had already been awarded the project. As a result of the union activities, Petrochem lost over a million dollars in revenue, and faced the prospect of additional lost revenue.

Finding the loss intolerable and anticipating the Unions' activities would continue to cost Petrochem business in the future, and because Petrochem believed the Unions' actions constituted "extortion" and were probably illegal, Petrochem filed a lawsuit in 1990 in the United States District Court for the Northern District of California, No. C-90-3628, against those unions which it could identify as being involved in the permit extortion campaign: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO, Locals 62, 159, 228, 246, 342, 343, 350, 393, 442, 447, 467, 483 (hereinafter "Unions"). Petrochem asserted claims under RICO and federal antitrust laws. Petrochem undertook its lawsuit in an attempt to recover the damages it suffered as a result of what it

believed, in good faith, to be the Unions' unlawful activities directed at its clients and prospective clients.

Prior to filing the action, Petrochem retained counsel to perform an ambitious and extensive factual and legal investigation, including consulting with a number of experienced RICO and antitrust attorneys. Petrochem's counsel concluded and subsequently advised Petrochem that it had a legally cognizable claim under both RICO and the antitrust statutes, based upon the application of these statutes to analogous situations.

Ultimately, the district court dismissed Petrochem's lawsuit with prejudice without allowing Petrochem to conduct discovery. (App. 50 to App. 78). The Ninth Circuit affirmed the district court's opinion, and this Court denied *certiorari*. *Petrochem Insulation, Inc. v. United Assoc. of Journeymen & Apprentices of the Plumbing Indus.*, 8 F.3d 29 (1993), *cert. denied*, 510 U.S. 1191 (1994) (App. 42 to App. 49).

On June 18, 1991, the Unions filed a charge against Petrochem with the National Labor Relations Board (hereinafter "NLRB" or "Board"), alleging that the filing of the lawsuit violated Section 8(a)(1) of the NLRA. In May 1996, the General Counsel for the NLRB issued a complaint against Petrochem, alleging that Petrochem had violated Section 8(a)(1) by filing and maintaining its lawsuit against the Unions. On November 19, 1999, the NLRB granted the General Counsel's motion for summary judgment, issued a Decision and Order finding that Petrochem had violated Section 8(a)(1) by filing and maintaining an unsuccessful lawsuit against the Unions, and ordered Petrochem to reimburse the Unions for all

attorneys' fees and other expenses incurred in defending the lawsuit. *Petrochem Insulation, Inc.*, 330 N.L.R.B. No. 10 (1999) (App. 21 to App. 41).

The NLRB found that, under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), Petrochem's lawsuit "lacked merit" because Petrochem did not prevail. The NLRB rejected Petrochem's argument that under *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), the General Counsel was required to establish not only that Petrochem's lawsuit was not successful, but that it was "baseless," meaning that "no reasonable litigant could realistically expect success on the merits." *Id.* at 49. The NLRB made no findings as to whether Petrochem's lawsuit was baseless, holding that under *dicta* in the *Bill Johnson's Restaurants* decision, an improperly motivated lawsuit may be found to violate the NLRA if the lawsuit is not successful, no matter how well-founded it might be. The Board also found that Petrochem's lawsuit was filed for retaliatory reasons because (1) it was aimed at protected activity; (2) it did not prevail; and (3) it asked for treble damages.

The NLRB held that the Unions' permit extortion activities were protected under the NLRA, as "concerted activity that falls-within the 'mutual aid or protection' " language of Section 7 of the Act, 29 U.S.C. § 157. *Petrochem*, 330 N.L.R.B. No. 10, *14. Because the Unions were engaged in protected Section 7 activity and Petrochem's lawsuit was "meritless" and retaliatory, the Board found that Petrochem had committed an unfair labor practice in violation of § 8(a)(1) by filing its lawsuit.

Petrochem filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, and the NLRB filed a cross-application for enforcement. A three judge panel upheld the finding of the NLRB that Petrochem had violated Section 8(a)(1) of the Act by filing an unsuccessful lawsuit against the Unions and affirmed the NLRB's Order awarding attorneys' fees to the Unions.

The court of appeals acknowledged the incongruity between the First Amendment protection afforded the filing of a lawsuit under the NLRA by the Board and the much higher standard applied in the context of other statutes, but felt bound by *dicta* in *Bill Johnson's Restaurants*, commenting: "Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than others), but until that day the language in *Bill Johnson's* must control." *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir. 2001). The court of appeals also found that unions enjoy Section 7 rights despite the plain language of *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) that "the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Petrochem*, 240 F.3d at 29-30. Petrochem filed a petition for rehearing, *en banc*, which was denied by the court of appeals on April 16, 2001.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE NLRB'S MISAPPLICATION OF *DICTA* IN *BILL JOHNSON'S RESTAURANTS*, UPHELD BY THE COURT OF APPEALS, CONFLICTS WITH THIS COURT'S DECISION IN *PROFESSIONAL REAL ESTATE INVESTORS* AND, AS SUGGESTED BY THE COURT OF APPEALS, REQUIRES THE INTERVENTION OF THIS COURT TO AVOID A DOUBLE STANDARD BY WHICH LAWSUITS ARE AFFORDED A FAR LOWER STANDARD OF FIRST AMENDMENT PROTECTION UNDER THE NLRA THAN IS APPLIED UNDER OTHER STATUTES.

This case presents to the Court the opportunity to correct a dangerous anomaly which has developed as a result of *dicta* in a 1983 decision of this Court, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). This *dicta* has been adopted and interpreted by the Board so as to completely remove all First Amendment protections afforded to the acts of filing and prosecuting a lawsuit, in any case brought by an employer against employees or a labor organization, unless the employer prevails in the lawsuit. The NLRB's position flies in the face of this Court's decision, *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), and creates, under the NLRA, an area of the law in which the First Amendment right to petition is diminished almost to the point of nonexistence. This result is in stark contrast to the First Amendment standard applied under other statutory law, where that same First Amendment right to petition is given significant protection under *Professional Real Estate Investors*. At least two courts of appeals, although sustaining the Board's decision because

of an unwillingness to ignore the *dicta* in *Bill Johnson's Restaurants,* have nevertheless suggested that the disparity in First Amendment protection between that afforded under the NLRA and that afforded under all other statutes, is inexplicable under the Constitution and cries out for resolution by this Court. *Petrochem,* 240 F.3d at 32; *White v. Lee,* 227 F.3d 1214, 1236 (9th Cir. 2000).

This Court describes the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967).

"The First Amendment guarantees 'the right of the people . . . to petition the Government for a redress of grievances.' The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith,* 472 U.S. 479, 482 (1985). "[E]xcept in the most extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions . . . ' " *Id.* at 486 (Justice Brennan concurring, quoting in part from *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937)).

The standard by which the act of filing and prosecuting a lawsuit is protected under the First Amendment from being penalized as a statutory violation was first developed in the context of the antitrust laws. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington,*

381 U.S. 657 (1965), this Court established that a statutory violation could not be based upon the act of lobbying the legislative or executive branches of government for particular action, an act that constituted an exercise of the right to petition. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court extended the *Noerr-Pennington* doctrine to protect citizens who brought actions before administrative agencies and in the courts. The Court instructed that only "sham" petitioning activities were not protected from statutory liability. The Court has subsequently expanded the *Noerr-Pennington* doctrine and the related concept of "sham" petitioning beyond the antitrust context. In 1983, the Court expanded the doctrine to the context of the NLRA, in *Bill Johnson's Restaurants. Professional Real Estate Investors*, 508 U.S. at 59.

In *Bill Johnson's Restaurants*, the Court was asked to decide only "whether the [Board] may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law." *Bill Johnson's Restaurants*, 461 U.S. at 733. The Court held that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." *Id.* at 748.

The Court identified two interests, both of which had to be addressed in considering whether the filing of a lawsuit could constitute a violation of the Act. The first was the First Amendment right to petition. The second

involved state interests arising from the "States' compelling interest in the maintenance of domestic peace." *Id.* at 741.

In *dicta*, toward the end of the decision, the Court briefly discussed the disposition of unfair labor practice charges after the lawsuit is complete. In so doing the Court addressed only the state's interest:

> If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case. . . .

Id. at 747. Thus, the Court did not address the First Amendment issue in the post-litigation situation.

Ten years later, in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), this Court clarified the standard for determining whether litigation is protected by the First Amendment:

> Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component. . . . Whether applying *Noerr* as an antitrust doctrine *or invoking it in other contexts*, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. . . . Indeed, by analogy to *Noerr's* sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor

> Relations Act as an unfair labor practice unless such litigation is "baseless."

Id. at 58-59 (citing *Bill Johnson's Restaurants*) (emphasis added; internal citations omitted).[1]

The Court then described a two-prong test to determine the limited circumstances under which a lawsuit loses its First Amendment protection. First, the lawsuit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" at the time it was filed. *Id.* at 49. The Court explained that if a plaintiff has "probable cause to institute" a lawsuit, then the lawsuit is not objectively baseless, and that "[p]robable cause to institute civil proceedings requires no more than a 'reasonable belief that there is a chance that [a] claim may be held valid upon adjudication. . . . ' " *Id.* at 62-63 (internal citations omitted) (alterations in original). Moreover, the Court warned that "when the . . . defendant has lost the underlying litigation, a court must 'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.' . . . The court must remember that 'even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing

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[1] The second sentence of this quoted language emphasizes the equivalence of the concept of "sham" litigation in antitrust law and "baseless" litigation as discussed in *Bill Johnson's Restaurants*.

suit.' " *Id.* at 61, fn.5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)[2]).

Second, the Court explained that even if a lawsuit is objectively baseless, it must still be determined that the litigant was not motivated by a subjective expectation of success, i.e., the litigant was motivated by retaliatory reasons. *Professional Real Estate Investors*, 508 U.S. at 60-61.

Since the *Bill Johnson's Restaurants* decision, the NLRB has taken the position that if an employer's lawsuit against employees or a union is ultimately unsuccessful, any concern for the employer's First Amendment right to bring the lawsuit is eliminated, regardless of whether the lawsuit was baseless, and the NLRB need only determine that the lawsuit was brought for a retaliatory motive to find that filing and prosecuting the lawsuit constituted an unfair labor practice in violation of the NLRA. The Board's discussion of the merits of Petrochem's lawsuit is a prime example of the Board's approach. That discussion is limited to the confines of one short paragraph;

> As discussed above, the district court dismissed [Petrochem's] lawsuit including the allegation

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[2] In *Christiansburg Garment*, the Court elaborated:

> This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how . . . meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation.

Christiansburg Garment, 434 U.S. at 422.

> that the Unions' governmental petitioning activity constituted antitrust violations, and the Ninth Circuit affirmed the result. Accordingly, the Respondent's suit lacked merit within the meaning of *Bill Johnson's*. [footnote omitted] We therefore consider whether the suit was filed with an intent to retaliate against the Unions for engaging in protected activity.

Petrochem Insulation, Inc. 330 N.L.R.B. No. 10, *10-11 (1999).

In taking this approach, the Board has expressly declined to follow this Court's pronouncement of the First Amendment standards in *Professional Real Estate Investors. See, e.g., BE&K Construction Co.*, 329 N.L.R.B. No. 68, *24-25 (1999); *Petrochem Insulation, Inc.*, 330 N.L.R.B. No. 10, *10-11 (1999). It is this unthinking and erroneous interpretation of *dicta* from the *Bill Johnson's Restaurants* case, flying squarely in the face of this Court's decision in *Professional Real Estate Investors*, that requires this Court's attention to ensure that First Amendment protections are uniformly applied.

A. The Second Circuit Court Of Appeals, In Conflict With Other Courts Of Appeals, Has Refused To Accept The NLRB's Lower Standard For Determining A Lawsuit's Merit For First Amendment Purposes.

Although other courts of appeals have accepted the Board's rote application of the *Bill Johnson's Restaurants Dicta*, e.g., *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085 (9th Cir. 1995); *BE&K Construction Co. v. NLRB*, 246 F.3d 619 (6th Cir. 2001), the Second Circuit, has declined

to accept the Board's abbreviated determination of the merit of a withdrawn lawsuit and applied a much stronger standard, similar to that later announced in *Professional Real Estate Investors*:

> Because the Board did not find that Vanguard's suit lacked a reasonable basis in fact or law, either at the outset or at the point when the employer briefly permitted it to remain pending, the Board's determination that the lawsuit was an unfair labor practice may not be sustained.

NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 66 (2nd Cir. 1962). Thus, in addition to the conflict between the Board's standard and this Court's *Professional Real Estate Investors* decision, there is a conflict among the circuits over this standard, which must be resolved by this Court.

B. Within The Last Year, Two Courts Of Appeals Have Strongly Suggested That This Court Should Address The Apparent Disparity Between the First Amendment Standard Created By The NLRB's Application Of The *Bill Johnson's Restaurants Dicta* And The Standard This Court Created In *Professional Real Estate Investors*.

Two courts of appeals have, within the last year, raised questions about the substantially reduced First Amendment protections afforded by the Board's continued use of the *Bill Johnson's Restaurants dicta*. In *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), the court addressed the question of whether an unsuccessful state-court lawsuit against a zoning adjustment board, brought by a group of

citizens in an effort to stall conversion of a motel into a multi-family housing unit for homeless persons, could be found to have constituted a violation of the Fair Housing Act. Officials of the Department of Housing and Urban Development argued that, in deciding whether that lawsuit violated the Fair Housing Act, the *Bill Johnson's Restaurants* standard, rather than the stricter *Professional Real Estate Investors* standard, should be applied to determine First Amendment protection. In discussing that proposition, the court of appeals discussed the conflict of the two decisions:

> Notwithstanding the foregoing analysis and its affirmance of the principles set forth in *California Motor Transport*, the Court in *Bill Johnson's* then went on to draw a distinction with respect to the NLRB's right to impose remedies for the filing of state-court lawsuits that were pending and those that had concluded in a judgment adverse to the plaintiffs. The latter lawsuits, the Court stated, did not receive the same broad immunity from NLRB action as the former. Once the plaintiff lost its lawsuit, the NLRB could "consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, . . . find a violation and order appropriate relief." *Id.* at 749. Such NLRB action was permissible because at that point "the employer has had its day in court, [and] the interest of the state in providing a forum for its citizens has been vindicated." *Id.* at 747. We would ordinarily be tempted to treat these statements in *Bill Johnson's* as *dicta*, because they were not pertinent to the case before the Court and because in *Professional Real Estate Investors*, decided ten years later, the Court did not even

> mention the *Bill Johnson's* statements when holding that unsuccessful lawsuits receive the traditional protection described in *California Motor Transport*, specifically including the requirement of objective baselessness. [footnote 18 omitted]. Whatever we might otherwise make of the apparently contradictory positions announced by the Court, however, this circuit is not free to ignore the *Bill Johnson's* statements. On the basis of those statements, we have rejected an employer's argument that the NLRB erred in failing to determine whether a libel suit, which did not survive a demurrer in state court, was baseless. See *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995). In that case we held that "bringing an action that proves unmeritorious may constitute an unfair labor practice, even though the suit did not lack a reasonable basis in law or fact at the time it was filed." *Id.* We are bound by *Diamond Walnut*, and therefore by the *Bill Johnson's* statements.

White v. Lee, 227 F.3d at 1235-36.

The Ninth Circuit's doubts about the continued viability of the *Bill Johnson's Restaurants dicta*, as adopted by the Board, in the face of this Court's decision in *Professional Real Estate Investors*, is emphasized in the text of footnote 18:

> Particularly notable is the fact that in *Professional Real Estate Investors*, the Court cited the holding in *Bill Johnson's* that "by analogy to *Noerr's* sham exception, . . . even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.' " 508 U.S. at 59. However, rather than

> applying or even citing the subsequent *Bill Johnson's* statements regarding unsuccessful lawsuits, the Court emphasized that a litigant's failure to prevail did *not* establish the objective baselessness of his suit, and it proceeded to apply *Noerr-Pennington* immunity to an action that had in fact been defeated on summary judgment. Had the Court believed that the statements in *Bill Johnson's* had any effect, we would expect that it would have explained why it did not apply them in the case before it. The fact that the Court did not do so indicates that it considered the statements dicta.

White v. Lee, 227 F.3d at 1235 n.18.

Similarly, while upholding the Board's decision in this case, the Court of Appeals for the District of Columbia Circuit expressed significant reservations over the substantial reduction of First Amendment protections reflected by the Board's application of the *Bill Johnson's Restaurants dicta* and suggested that this Court should take up and clarify the differing standards reflected by *Bill Johnson's Restaurants*, as applied by the Board, and *Professional Real Estate Investors*. Said the Court, after accepting the Board's application of the *Bill Johnson's Restaurants dicta*:

> We understand that this sets the bar for sham litigation – litigation not protected by the First Amendment – lower than in *Noerr-Pennington* cases; on proof of retaliation, employer suits that are better than baseless under *Noerr-Pennington* (ones for which "there is any realistic chance that the plaintiff's legal theory might be adopted" *id* at 747), may evidently be classified as sham litigation after the employer-plaintiff

> loses. Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both the NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than others), but until that day, the language in *Bill Johnson's* must control.

Petrochem Insulation, Inc. v. NLRB, 240 F.3d at 32.

The Board's application of the *Bill Johnson's Restaurants dicta* has already resulted in numerous cases in which lawsuits which were clearly not "objectively baseless," within the meaning of *Professional Real Estate Investors* and, thus, entitled to protection under the First Amendment, were nevertheless found to violate the National Labor Relations Act. *See Braum Elec. Co, Inc.*, 324 N.L.R.B. 1 (1997); *H.W. Barss Co.*, 296 N.L.R.B. 1286 (1989); *Phoenix Newspapers, Inc.*, 294 N.L.R.B. 47 (1989).

The evidence before the NLRB demonstrated that, at the time the lawsuit was filed and prosecuted, Petrochem had an objectively reasonable belief that it could prevail and a subjective expectation of success on the merits. However, neither the NLRB nor the court of appeals examined that evidence. Finding that Petrochem did not prevail, the NLRB, sustained with reservations by the court of appeals, found no need to be concerned about First Amendment rights and proceeded, primarily on the basis of that same failure to prevail, to find a violation of the NLRA.

Given the standard applied by the Board and the court of appeals, it would not have mattered had Petrochem's case proceeded beyond the motions for dismissal, had Petrochem succeeded in avoiding summary

judgment on subsequent motions, and had Petrochem and the Unions engaged in a hotly-contested trial, months in duration, with a multitude of indications by the trial judge that it was a close question, ultimately resolved in favor of the Unions by the closest of margins. None of that, by the NLRB's standard, is material. It matters only that Petrochem did not win. It is hard to imagine a standard which would more certainly and thoroughly chill the employer's First Amendment right to petition, unless it were a standard that made *all* lawsuits against unions a violation of the Act.

From the above, it must be apparent that this Court must grant *certiorari* in this case in order to clarify, as suggested by the courts of appeals, that, in fact, the First Amendment does not afford a much lesser degree of protection under the NLRA than it does in the context of other laws; and to correct the decision of the appellate court in this case, which flies in the face of this Court's decision in *Professional Real Estate Investors.*

II. THE NLRB AND THE COURT OF APPEALS ERRED IN RULING THAT THE UNIONS' ENVIRONMENTAL PERMIT EXTORTION ACTIVITIES, WHICH WERE UNRELATED TO THE INTERESTS OR ACTIVITIES OF ANY IDENTIFIABLE GROUP OF EMPLOYEES, ARE PROTECTED BY SECTION 7 OF THE NLRA, IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *LECHMERE* THAT UNIONS DO NOT HAVE RIGHTS PROTECTED BY SECTION 7 AND CAN DERIVE ONLY LIMITED SECTION 7 PROTECTION FOR ACTIVITIES WHICH ARE A NECESSARY PART OF THE EXERCISE OF PROTECTED RIGHTS BY IDENTIFIABLE EMPLOYEES.

Contrary to the rulings of the NLRB and the court of appeals in this case, this Court has plainly stated that Unions do not have independent Section 7 rights. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court stated:

> Section 7 of the NLRA provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. § 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C.§ 158 (a)(1). *By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.*

Id. at 531-32 (emphasis added). *See also, NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In both *Lechmere* and *Babcock & Wilcox* the Supreme Court held that only employees, and not unions, have Section 7 rights. The

Court explained that union actions could derive Section 7 protection only when the union actions were a limited, necessary part of the exercise by an identifiable group of employees of *their* Section 7 rights. *Lechmere*, 502 U.S. at 532.

Despite the plain language of *Lechmere*, the NLRB held that the Unions' permit extortion activities in this case were protected by Section 7, despite the lack of any evidence that those activities were undertaken for or contributed to the exercise of Section 7 rights by any identifiable group of employees. The court of appeals accepted the NLRB's analysis. *Petrochem*, 240 F.3d at 26 (2001) (*quoting BE&K Constr. Co.*, 329 N.L.R.B. No. 68 (1999)). In so doing, the NLRB and the court of appeals not only granted to unions the protection of Section 7 but extended that protection to virtually any action that a union might undertake. Although the court of appeals could not "imagine a more reasonable interpretation of section 7," it conforms neither with the plain language of the Act nor with explicit Supreme Court precedent explaining that Section 7 applies "only derivatively" to unions. *Petrochem*, 240 F.3d at 31.

To support its ruling, the court of appeals artificially limited *Lechmere's* discussion of Section 7 rights to the facts of the case and found that it had no application beyond the holding "that non-employee union representatives have no affirmative NLRA right to trespass on employer property when they could reach the employees through usual off-site channels." *Id.* at 29. In doing so, the court of appeals ignored the plain language of the *Lechmere* opinion: "the NLRA confers rights only on *employees*,

not on unions or their non-employee organizers." *Lechmere*, 502 U.S. at 532 (emphasis in original).

The evidence before the NLRB demonstrated that the Unions were engaged in a campaign of identifying "non-union" projects, filing or threatening to file environmental and other permit objections against those projects which had not yet begun, and then using the resulting burden of cost and delay to coerce the project developer, which was not an employer in the construction industry, to enter into an agreement to not use non-union contractors on the project. The Unions did not represent nor were they attempting to represent Petrochem's employees. There were no employees on the targeted projects because the projects had not begun. Nevertheless, the Board found the Unions' environmental permit extortion to be protected by Section 7.[3]

Moreover, in applying its *Bill Johnson's Restaurants* doctrine to this situation, where Petrochem did not sue its employees or a union representing its employees, the Board expanded the application of that doctrine beyond

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[3] As described in the Unions' publication, of the more than ten projects against which objections were interposed by one or more of the Unions, the objections dealt almost exclusively with general community interests, not the interests of employees, *as employees*. Issues raised concerned air emissions, air quality controls, county use permits, the adequacy of city general land use plans, and groundwater contamination. In general, the objections had nothing to do with factors which would directly impact the terms or conditions of employment on the project or with decisions to be made by the contractors who might ultimately build the project.

any existing law and in conflict with this Court's *Lechmere* decision and the plain meaning of Section 7 of the NLRA. With the exception of *BE&K Constr. Co.*, 329 N.L.R.B. No. 68 (1999) (App. 120 to App. 194), which was decided shortly before Petrochem's case, the Board and the courts have uniformly invoked the *Bill Johnson's Restaurants* doctrine only where (1) the challenged lawsuit was directed at what were clearly "employees" for activity engaged in by those "employees" or (2) the lawsuit was filed against the union which represented the employees of the employer that filed the lawsuit and was directed against union actions in behalf of or in support of those employees in exercising their Section 7 rights.

It is important that this Court grant the requested writ and correct the misapplication of its *Lechmere* decision by which the Board and the court of appeals have so grossly expanded the reach of Section 7 protection beyond the plain and limited meaning of that statute.

III. THE NLRB'S REMEDY, UPHELD BY THE COURT OF APPEALS, GRANTING TO THE UNIONS THEIR ATTORNEYS' FEES INCURRED IN DEFENDING *PETROCHEM'S* LAWSUIT, CONFLICTS WITH THIS COURT'S *SUMMIT VALLEY INDUSTRIES* DECISION AND WITH THE AMERICAN RULE.

As it did in this case, the NLRB has used its remedial authority under Section 10(c) to routinely award attorneys' fees as a remedy in *Bill Johnson's Restaurants* cases, where the prosecution of a lawsuit is found to have violated the NLRA. Although the NLRB's remedial power is subject only to "limited judicial review," when the

NLRB exceeds its authority, contravenes congressional intent and Supreme Court precedent, and abrogates the "American Rule," review is both appropriate and necessary.

In *Summit Valley Industries, Inc. v. United Bhd. of Carpenters & Joiners*, 456 U.S. 717 (1982), this Court held that attorneys' fees incurred in prosecuting an earlier lawsuit could not be recovered as damages under Section 303 of the Labor Management Relations Act. The Court explained in *Summit Valley*, that "under the American Rule it is well established that attorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' " *Id.* at 721 (*quoting Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967)). The Court also explained that "one of the primary justifications for the American Rule is that one should not be penalized for merely defending or prosecuting a lawsuit." *Summit Valley*, 456 U.S. at 724. The Court stated:

> Even assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express Congressional authority . . . .
>
> In squarely rejecting this claim, we found it to be nothing more than a "[restatement] of one of the oft-repeated criticisms of the American Rule." . . . Although this Court acknowledged that "there is some force to the argument that a party who must bear the cost of his attorneys' fees out of his recovery is not made whole," we concluded that the countervailing considerations which support the American Rule argue

> against placing exclusive reliance on the need to provide full compensation.

Id. at 725 (*quoting F.D. Rich Co. v. United States*, 417 U.S. 116 (1974)) (internal citations omitted).

In support of its award of attorneys' fees, the NLRB relies solely on the language of Section 10(c), which authorizes the NLRB "to take such affirmative action including reinstatement of employees with or without back pay, as will be necessary to effectuate the policies of" the Act, but makes no mention of attorneys' fees. In that respect, it is not significantly different from the language concerning remedies in Section 303 of the LMRA.

That the *Summit Valley* decision is applicable to the NLRB is evident from this Court's action when, one month after issuing *Summit Valley*, the Court vacated and remanded *J.P. Stevens & Co.*, 244 N.L.R.B. 407 (1979), *enf'd* 668 F.2d 767 (4th Cir. 1982), *judgment vacated*, 458 U.S. 1118 (1982), *decision supplemented*, 268 N.L.R.B. 8 (1983), for reconsideration in light of *Summit Valley*. In *J.P. Stevens*, the Court was faced with a question virtually identical to the issue presented here. As in this case, in *J.P. Stevens*, the NLRB had found that the employer had committed unfair labor practices in violation of Section 8 of the Act. The NLRB ordered, among other remedies, that J.P. Stevens pay the union's costs and attorneys' fees incurred in prior litigation. The Fourth Circuit affirmed the NLRB's Order, specifically discussing the appropriateness of an award of attorneys' fees incurred in prior litigation in "cases of flagrant, aggravated, persistent, and pervasive employer misconduct." *J.P. Stevens & Co. v. NLRB*, 668 F.2d 767, 777 (4th Cir. 1982). However, the

Fourth Circuit did not consider the authority of the NLRB to award attorneys' fees for prior litigation in light of the American Rule and *Summit Valley* (then not yet decided by this Court). The Supreme Court vacated and remanded the decision for reconsideration in light of *Summit Valley*. At the Board's request, the court of appeals remanded the case to the Board, which entered a Supplemental Decision and Order that omitted any requirement for the payment of attorneys' fees. *J.P. Stevens & Co.*, 268 N.L.R.B. 8 (1983). It is clear, and the Board implicitly recognized, that the Court's action suggested that *Summit Valley* precluded the Board from awarding attorneys' fees in connection with a finding of a violation of Section 8 of the Act.

While it is true that the Court in *Bill Johnson's Restaurants* refers, in *dicta*, to an award of attorneys' fees where a violation of the Act is found following the conclusion of an unsuccessful lawsuit, the issue of whether the NLRB is actually authorized to order such a remedy was not before the Court and was obviously not considered.

The NLRB's interpretation of *Bill Johnson's Restaurants* essentially abrogates the American Rule. According to the Board, if an employer loses a lawsuit against a labor organization, the lawsuit may be found to have been meritless, improperly motivated, and violative of the NLRA. Consequently, the employer will be ordered to reimburse the labor organization for the legal fees incurred in the lawsuit. The order to pay the union's attorneys' fees, absent any express authorization by Congress to grant such fees or analysis of the baselessness of

the original action, constitutes an unauthorized abrogation of the American Rule and an unauthorized remedy under the Act.

Although § 10(c) of the Act authorizes the Board to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]," this Court made clear in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938), that the Board may not "inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

CONCLUSION

The writ requested should issue because this case involves serious and substantial issues involving decisions by the NLRB and the court of appeals which conflict with decisions of this Court and involving a serious constitutional issue which, as suggested by the court of appeals, requires the intervention of this Court to resolve what the court of appeals views as a conflict between this Court's decision in *Professional Real Estate Investors* and

the *dicta* in the earlier *Bill Johnson's Restaurants* decision, *dicta* which has been interpreted to eliminate First Amendment rights.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETROCHEM INSULATION, INC., PETITIONER v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCALS 62, ET AL., INTERVENOR

No. 99-1530

November 13, 2000, Argued
January 26, 2001, Decided

COUNSEL: Lawrence W. Marquess argued the cause for petitioner. With him on the briefs was Darin L. Mackender. Heather L. MacDougall and Daniel V. Yager were on the brief of amici curiae LPA, Inc. and Associated Builders and Contractors, Inc.

Anne Marie Lofaso, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were Leonard R. Page, General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and David S. Habenstreit, Supervisory Attorney.

Peter D. Nussbaum argued the cause and filed the brief for intervenor.

JUDGES: Before: EDWARDS, Chief Judge, WILLIAMS and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge TATEL.

OPINION BY: TATEL

OPINION: On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

TATEL, Circuit Judge: The National Labor Relations Board found that petitioner committed an unfair labor practice by bringing a RICO suit against unions that opposed construction and other permits sought by non-union contractors. The Board ordered petitioner to pay the legal fees the unions incurred in defending the suit. Because we agree with the Board that the unions' activities were protected by the National Labor Relations Act, and because the Board's finding that petitioner's lawsuit was both unmeritorious and retaliatory is supported by substantial evidence, we deny the petition for review and grant the Board's cross-application for enforcement.

I

In the 1980's, construction unions in Northern California began filing environmental objections to zoning and construction permits sought by non-union developers and contractors. Among other things, the unions objected to inconsistencies between construction proposals and regional development plans, to the failure to prepare required environmental impact reports, and to use permits for facilities that the unions predicted would cause surrounding areas to exceed air pollution limits under the Clean Air Act. An internal union report explained: "we have seen irresponsible companies build projects which have caused more pollution than should be permitted. We are now threatened with construction moratoriums in many counties in California." Report by

Tom Hunter & Ray Foreman, Participation in the Permit Process 1 (1987) ("Union Report"). Asserting that "the burden of these moratoriums falls on the construction worker," *id.* at 1, the unions described their goal in the permitting processes as "advocating regulatory action which will force construction companies to pay their employees a living wage, including health and other benefits, and to meet their responsibilities to the community and the environment." *Id.* at 2. A San Francisco newspaper article further explained that to prevent nonunion contractors from continuing to hire out-of-state workers at $ 10-$ 12 an hour less than prevailing union wages, "the unions are arguing [to local governments] that the economic rewards of development are lost when local people aren't hired at the prevailing wage. Consequently, environmental shortcomings such as traffic and pollution should weigh heavy [sic] against such projects being approved, according to the union line of reasoning." *See* Bradley Inman, Unions Launch Attack on State Homebuilders, S.F. EXAMINER & CHRON., May 31, 1987, at F1.

A non-union California-based corporation, petitioner Petrochem Insulation, Inc. installs, repairs, and removes thermal insulation in construction and maintenance projects. According to Petrochem, several contractors, seeking to avoid union permit protests, informed Petrochem that it could neither bid for nor perform subcontract work on their Northern California construction projects. In response, Petrochem filed suit in the United States District Court for the Northern District of California, charging that twenty-one named unions, by filing environmental objections, were delaying and "threatening to

delay" construction projects "unless and until the project developers and/or general contractors agreed to boycott open-shop contractors such as Petrochem." Compl. at 23, *Petrochem Insulation, Inc. v. N. Cal. & N. Nev. Pipe Trades Council*, No. C-90-3628 (N.D. Cal. filed Dec. 20, 1990). According to the complaint, the unions' actions violated section 8(e) of the National Labor Relations Act. 29 U.S.C. § 158(e). Instead of seeking relief under the NLRA, however, the complaint claimed that the union permit objections amounted to criminal extortion under both state and federal law and charged that the extortion in turn constituted a predicate act under the Racketeering and Corrupt Organization Act. 18 U.S.C. §§ 1961-1968. Alleging that the unions had injured Petrochem both by preventing it from obtaining contracts and by damaging its goodwill and business reputation, the complaint sought treble damages pursuant to RICO section 1964(c). 18 U.S.C. § 1964(c).

The district court dismissed the complaint, finding the RICO claims preempted because the alleged predicate act rested on a violation of the NLRA. Order Dismissing Compl. Without Prejudice, Petrochem Insulation, Inc., No. C-90-3628, at 12 (N.D. Cal. filed Apr. 30, 1991). Petrochem sought leave to file an amended complaint realleging the same conduct but claiming this time that the unions had violated sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, in addition to RICO. Petrochem based this RICO claim on a different provision of the NLRA, 29 U.S.C. § 186, which prohibits employers from making payments to unions. Although the district court denied leave to file the amended complaint, finding it facially inadequate, the court permitted Petrochem to

file a second amended complaint provided that the company complied with four specific guidelines for pleading antitrust claims. Order Den. Recons. & Den. Leave to File First Am. Compl., Petrochem Insulation, Inc., No. C-90-3628, at 2-3 (N.D. Cal. filed July 30, 1991). The court also instructed Petrochem that should it again allege a RICO violation, its complaint had to conform to the court's "Standing Order re: RICO Actions." *Id.* at 3.

Petrochem filed a second amended complaint, again alleging RICO and Sherman Act violations. The district court dismissed, this time with prejudice, finding that the complaint failed to conform to the court's instructions and was legally inadequate for several other reasons. Mem. & Order Granting Defs' Mot. to Dismiss, Petrochem Insulation, Inc., No. C-90-3628 (N.D. Cal. filed Mar. 9, 1992). The Ninth Circuit affirmed in an unpublished opinion, and the Supreme Court denied certiorari. *Petrochem Insulation, Inc. v. United Ass'n of Journeymen & Apprentices of the Plumbing and Pipe Fitting Indus.*, 8 F.3d 29 (9th Cir. 1993), cert. denied, 510 U.S. 1191, 127 L. Ed. 2d 647, 114 S. Ct. 1293 (1994).

The NLRB General Counsel then filed a complaint alleging that by bringing a suit "without merit . . . to retaliate" against the unions for engaging in concerted activity protected by NLRA section 7, Petrochem committed an unfair labor practice in violation of NLRA section 8(a)(1). 29 U.S.C. § 158(a)(1). Granting the General Counsel's motion for summary judgment, the Board found Petrochem's lawsuit not only without merit but also "motivated by an intent to retaliate against the Unions' protected concerted activity on behalf of its members and other employees." *Petrochem Insulation, Inc.*, 1999 NLRB

LEXIS 812, 330 N.L.R.B. No. 10, 1999 WL 1065426, at *7 (Nov. 19, 1999). The Board ordered Petrochem to cease filing such lawsuits or otherwise interfering with employees in the exercise of their section 7 rights. The Board also ordered the company to reimburse the unions for the legal expenses they had incurred. *Id.*

Petrochem petitions for review and the Board, supported by union intervenors, cross-applies for enforcement. The company challenges each of the Board's key findings: (1) that the unions' participation in permit proceedings was protected by section 7; (2) that Petrochem's suit was meritless; (3) that the suit was retaliatory; and (4) that attorneys' fees were warranted. We consider the first of these arguments in Section II and the others in Section III. We affirm Board findings "unless they are unsupported by substantial evidence in the record considered as a whole, or unless the Board acted arbitrarily or otherwise erred in applying established law to the facts." *Reno Hilton Resorts v. NLRB*, 339 U.S. App. D.C. 25, 196 F.3d 1275, 1282 (D.C. Cir. 1999) (internal quotations and citations omitted).

II

We can easily dispose of Petrochem's argument that the unions' permit objections were unprotected by section 7. In relevant part, section 7 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

Petrochem first argues that unions, as opposed to employees, enjoy no section 7 rights. In support, it points to the Supreme Court's statement in *Lechmere, Inc. v. NLRB* that "the NLRA confers rights only on employees, not on unions or their non-employee organizers." 502 U.S. 527, 532, 112 S. Ct. 841, 117 L. Ed. 2d 79 (U.S. 1992). As both the Board and union intervenors correctly respond, however, *Lechmere* holds only that non-employee union representatives have no affirmative NLRA right to trespass on employer property when they could reach the employees through usual off-site channels. Indeed, *Lechmere* goes on to make clear that when employees are inaccessible, non-employee union representatives enjoy section 7 rights to enter employer property. *See id.* at 537. Of course, we face no question in this case of union access to private property. Under such circumstances, the Board has held, as it did here, that it would be a "curious and myopic" reading of the Act's core provisions "to hold that, although employees are free to join unions and to work through unions for purposes of 'other mutual aid or protection,' the conduct of the unions they form and join for those purposes is not protected by the Act." *BE & K Constr. Co.*, 329 N.L.R.B. No. 68, 1999 WL 883851, at *12 (Sept. 30, 1999). We cannot imagine a more reasonable interpretation of section 7. *See Lucile Salter Packard Children's Hosp. at Stanford v. NLRB*, 321 U.S. App. D.C. 126, 97 F.3d 583, 592 (D.C. Cir. 1996) (assuming that unions possess section 7 rights).

Petrochem next argues that even if unions sometimes enjoy section 7 protection, the Board had no basis for concluding that the petitioning activity in this case "was clearly protected." *Petrochem Insulation, Inc.*, 1999 WL

1065426, at *4. In so concluding, the Board relied on the unions' statement that they were intervening before state environmental and other regulatory permit proceedings in order to "force construction companies to pay their employees a living wage, including health and other benefits." Union Report at 2. In view of this objective, the Board found the unions engaged in a form of "area-standards activity" – concerted activity protected by section 7 because of the "legitimate interest" unions have in "protecting the employment standards [they have] successfully negotiated from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards." *See Petrochem Insulation, Inc.*, 1999 WL 1065426, at *4 (internal quotation omitted). If successful, the Board found, the unions "would not only expand union job opportunities for current union members but also would improve their ability to bargain for higher wages by mitigating employer resistance based on concerns about being undercut by non-union competitors." *Id.*

According to Petrochem, no record evidence supports the Board's finding that the unions were promoting employment standards they had negotiated in Northern California. In particular, Petrochem argues that because the unions objected to permits before projects had begun, the Board had no idea what wages and benefits actually would have been. Although this is true, we fail to see how the fact that construction had not yet started has anything at all to do with whether, in participating in permitting proceedings, the unions were seeking to protect area standards. Surely nothing in the NLRA prevents

unions from obtaining commitments from employers about wages and benefits for future jobs.

Citing a 1973 Board decision, Petrochem also argues that the unions must prove that the terms and conditions of employment maintained by the employers against whom they targeted their area standards activity were below those negotiated by the unions. Because the company failed to make this argument until its reply brief, however, it is not properly before us. *Corson & Gruman Co. v. NLRB*, 283 U.S. App. D.C. 239, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) ("We require petitioners and appellants to raise all of their arguments in the opening brief to prevent 'sandbagging' of appellees and respondents and to provide opposing counsel the chance to respond."). Even so, Petrochem itself supplied the very information it now claims is missing. The San Francisco newspaper article, *see supra* at 3, at F1, which Petrochem attached to its answer to the General Counsel's amended complaint to the Board, reports: "the prevailing union wage for plumbers is $ 22.72 per hour. Hunter [a union official] claims that some contractors are paying 'out-of-state workers $ 10-$ 12 an hour.' "

In its final attempt to convince us that the union permit challenges were unprotected by section 7, Petrochem points to NLRA section 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B), which makes it unlawful for labor organizations to "threaten, coerce, or restrain" any person engaged in commerce where "an object thereof" is "forcing or requiring any person . . . to cease doing business with any other person, or forcing or requiring any other

employer to recognize or bargain with a labor organization as the representative of his employees." *Id.* According to the company, the union petitioning activity violated section 8(b)(4)(ii)(B) because it coerced developers to cease doing business with Petrochem and other non-union companies.

The Board rejected this argument, relying on *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, where the Supreme Court interpreted section 8(b)(4)(ii)(B)'s coercion ban as not barring handbilling that urged consumer boycotts of secondary employers. Any other interpretation of section 8(b)(4), the Court warned, would pose "serious questions . . . under the First Amendment." *See* 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988). Concluding here that petitioning the government qualifies as political expression, the Board stated "in order to avoid the potentially serious First Amendment problems that would result if the Unions' governmental petitioning were found to constitute 'coercion' under Section 8(b)(4)(ii)(B), we shall follow DeBartolo and conclude that such conduct is lawful and, hence, protected by the Act." 1999 WL 1065426, at *5. The Board emphasized that it was not deciding "whether the Unions' petitioning could be found to be coercive for 8(b)(4) purposes if, as [Petrochem] alleges, the Unions had filed, or threatened to file, 'sham' petitions and meritless environmental objections with a secondary objective." *Id.* at *5. Pointing out that the California federal district court had found that Petrochem failed to identify a single meritless objection to any construction project, the Board concluded that all of the petitioning was protected by the First Amendment and thus not barred by

section 8(b)(4)(ii)(B). Again, we cannot imagine a more reasonable interpretation of the Act. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123, 98 L. Ed. 2d 429, 108 S. Ct. 413 (1987) (explaining that courts must defer to the NLRB's "interpretation of the NLRA as long as its interpretation is rational and consistent with the statute").

III

Having found no basis for upsetting the Board's conclusion that the permitting activity was protected by section 7, we turn to Petrochem's arguments that its lawsuit did not violate section 8(a)(1). 29 USC § 158(a)(1). To constitute an unfair labor practice, Petrochem's lawsuit must have both lacked merit and have been brought to retaliate against the unions' exercise of section 7 rights. *See Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 65 (1990).

Considering the first question – Did the company's lawsuit lack merit? – the Board relied on *Bill Johnson's Restaurants, Inc. v. NLRB*: "If judgment goes against the employer in the state court . . . or his suit is withdrawn or is otherwise shown to be without merit, . . . the Board may then proceed to adjudicate the . . . unfair labor practice case, the employer's suit having proved unmeritorious. . . . " 461 U.S. 731, 747, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). The Supreme Court, in other words, equates failing in state court with lacking merit, and the Board has found that reasoning applicable to failure in federal court as well. *See BE & K Construction Company*, 1999 WL 883851 at *8 (finding that there is "no reason not to regard the rulings of the federal courts . . . as equally

determinative on the question of whether the [employer's] federal court lawsuit lacked merit"). Applying the *Bill Johnson's* standard here, the Board found Petrochem's suit meritless because the California federal district court dismissed it and the Ninth Circuit affirmed. 1999 WL 1065426, at *4.

Petrochem argues that instead of relying on *Bill Johnson's*, the Board should have applied the more rigorous standard used to determine whether a suit is so baseless as to rob a plaintiff of normal *"Noerr-Pennington"* antitrust immunity. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993) (defining "sham" litigation as a lawsuit, brought with the intent to interfere directly with the business of a competitor, that is so objectively baseless that "no reasonable litigant could realistically expect success on the merits" and that therefore fails to receive *Noerr-Pennington* immunity). The company bases this argument on a sentence from Professional Real Estate Investors: "By analogy to [the antitrust] sham exception, we held [in *Bill Johnson's*] that even an improperly motivated lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is baseless." 508 U.S. at 59 (internal quotations omitted). As the Board points out, however, *see Petrochem Insulation, Inc.*, 1999 WL 1065426, at *3, this passage concerns when an active lawsuit can be "enjoined"; *Bill Johnson's* establishes a different standard for determining whether an adjudicated lawsuit was meritless. Compare *Bill Johnson's*, 461 U.S. at 744 (finding that baseless litigation can be enjoined as an unfair labor practice), with *id.* at 747 ("If judgment goes against the

employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, . . . the Board may then proceed to adjudicate the . . . unfair labor practice case."). Under the standard for adjudicated litigation, like Petrochem's, if the employer lost, the lawsuit is deemed unmeritorious.

We understand that this sets the bar for sham litigation-litigation not protected by the First Amendment – lower than in *Noerr-Pennington* cases; on proof of retaliation, employer suits that are better than baseless under *Noerr-Pennington* (ones for which "there is any realistic chance that the plaintiff's legal theory might be adopted," *id.* at 747), may evidently be classified as sham litigation after the employer-plaintiff loses. Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than others), but until that day the language in *Bill Johnson's* must control.

This brings us to the second question and the only tricky issue in this case: Did Petrochem file its lawsuit to retaliate against the unions for engaging in section 7 protected activities? Answering affirmatively, the Board relied on three factors: (1) Petrochem filed the lawsuit "in direct response" to the unions' participation in the permit proceedings; (2) the lawsuit had no merit; and (3) Petrochem sought RICO and antitrust treble damages instead of pursuing only compensatory damages under the NLRA. *See* 1999 WL 1065426, at *6.

We agree with Petrochem that the first factor cannot support the Board's retaliatory motive finding. Every

lawsuit seeking to recover damages caused by union activity is, by definition, filed "in direct response" to that activity. Yet not all meritless suits against unions or employees amount to unfair labor practices. Otherwise, *Bill Johnson's* would not have required the Board to determine whether unmeritorious lawsuits were filed for retaliatory reasons. Because the Board's directly-in-response-to factor exists in every case, it cannot help distinguish those suits that amount to unfair labor practices from those that do not.

Challenging the second basis for the Board's finding, Petrochem argues that considering the loss of its suit as evidence of retaliatory motive collapses the first prong of the unfair labor practice analysis (lack of merit) into the second (retaliation). This is true, but also precisely what *Bill Johnson's* permits: "The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." 461 U.S. at 747. Calling this language dicta, Petrochem urges us to ignore it, arguing that it threatens to deter employers from exercising their First Amendment right to petition the government through litigation. We share this concern, particularly if *Bill Johnson's* is read literally to mean, for example, that an employer who files a colorable lawsuit could be guilty of an unfair labor practice simply because the suit happens to lose, and the Board, relying on the loss, concludes that the suit was meritless and therefore retaliatory. We need not face this issue, however, for although we are bound by *Bill Johnson's*, this case does not involve a colorable, or

even just an unsuccessful, lawsuit. The Board found that Petrochem's suit was utterly meritless:

> [Petrochem's] lawsuit was found not just to have lacked merit – that would be a charitable characterization of its outcome. The lawsuit's claims did not even get to a jury . . . because it was unable to plead a legally cognizable cause of action, notwithstanding that the District Court provided . . . three opportunities to do so. This degree of failure undermines [Petrochem's] claim that it filed the suit to defend its legally protectable interests and demonstrates instead its retaliatory purpose.

1999 WL 1065426, at *6 (internal quotations and citations omitted). Thus, whatever merit Petrochem's First Amendment argument might have in the abstract, it has no applicability where, as here, the employer's suit was completely without merit.

Citing a law review article that mentions in one sentence the possibility of RICO and antitrust suits against unions, *see* Stanley J. Brown & Alyse Bass, Corporate Campaigns: Employer Responses to Labor's New Weapons, 6 LAB. LAW. 975, 983 (1990), Petrochem asserts that its suit was novel, not baseless. "Novel" may well be one way to describe the company's suit. Novelty, however, is not necessarily inconsistent with meritlessness; indeed, in view of the district court's total rejection of the suit, we agree with the Board that describing it as meritless would be "charitable." Not only did the district court dismiss the company's first two complaints, but the many reasons it gave for dismissing the second amended complaint with prejudice demonstrate that, in the court's view, the suit had absolutely no merit. In particular, the

court gave three independent reasons for dismissing the RICO claim: (1) Petrochem's theory that the manner in which the unions collected money to support their petitioning activity somehow violated NLRA section 186 was not only contrary to Ninth Circuit precedent but also unsupported by section 186's text, Mem. and Order Granting Defs' Mot. to Dismiss, at 5-6; (2) even if the unions' activities did violate section 186, Petrochem would nonetheless have lacked standing to challenge such a violation, *id.* at 8; and (3) the company failed to comply with the district court's specific orders for filing RICO claims, *id.* at 11. The court gave two reasons for dismissing the Sherman Act section 1 claim: (1) Petrochem failed to identify the parties to and contents of any alleged contract, combination, or conspiracy in restraint of trade, thus violating the specific instructions the court gave when rejecting the company's first amended complaint, *id.* at 12; and (2) Petrochem failed to plead an injury to competition resulting from the alleged contracts, *id.* at 16. Apparently unconvinced even by the company's allegations of its own injuries, the court noted, "at most, [the complaint] alleges that [Petrochem] could not submit bids to four projects out of the approximately 93 projects identified in the complaint. It does not allege that [Petrochem] actually submitted a low bid, nor that any project awarded [the company] was withdrawn." *Id.* at 17. Dismissing Petrochem's Sherman Act section 2 claim, the court found: (1) the company failed to identify the contractors who allegedly combined with the unions to monopolize the construction market, *id.* at 23; and (2) despite having "premised its monopolization claim upon the theory that [the unions] engaged in sham petitions

and baseless environmental objections," and having been warned by the court that it needed to provide factual support for that claim, Petrochem failed to identify a single meritless objection "or allege why such objection should be considered meritless," *id.* at 25.

Had Petrochem offered some reason other than the novelty of its approach to believe that, notwithstanding the district court's firm rejection of its claims, the suit was nevertheless not without merit, we would of course have taken it into consideration. But in the absence of any such explanation and in view of the reasons the district court gave for dismissing Petrochem's complaints, we have no basis for questioning the Board's assessment of the company's litigation.

Petrochem also challenges the Board's third basis for inferring retaliatory motive: the company's effort to obtain treble damages by trying to convert labor law claims into RICO and antitrust actions. As the Board saw it, seeking treble damages undermined Petrochem's claim that it filed suit not to retaliate, but to "recover the economic losses caused by the Unions' illegal conduct." Pet'r Br. at 40. The Board explained:

> It was the selection of the RICO and antitrust claims, with their provisions for treble damages, which underscores the [company's] retaliatory intent. [Petrochem] had available a less drastic means of recovering its alleged losses; it could have filed suit in Federal district court under Section 303 of the Act to recover its actual damages by alleging as unlawful what it now argues was unprotected conduct, i.e., that the Unions' conduct violated Section 8(b)(4). Instead, its RICO and antitrust claims constituted an

> attempt to obtain three-times its actual damages. In comparable circumstances where an employer has sought punitive damages in addition to alleged actual damages, the Board has inferred retaliatory intent. We draw the same inference here.

1999 WL 1065426, at *6 (citations omitted).

Petrochem argues that the Board should not have drawn any inferences from its decision to seek a remedy expressly authorized by federal law. Had this been the sole basis for the Board's decision, Petrochem's argument might have some appeal. The record is clear, however, that the Board did not rely solely on Petrochem's request for treble damages. The Board specifically stated that "retaliatory motive can be inferred, in part, from the treble damages [Petrochem] sought." *Id.* (emphasis added). Because the Board's principal finding was that Petrochem's suit was utterly meritless, it was not improper for the Board to cite the company's decision to seek treble damages as additional evidence of retaliatory motive. *Cf. Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1089 (9th Cir. 1995) (finding the fact that an employer sought punitive damages in its suit against a union to be evidence that the suit was retaliatory); *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974) (characterizing antitrust treble damages as punitive).

Given the special deference we owe NLRB findings of motive, *Reno Hilton Resorts*, 196 F.3d at 1282 (citing *Laro Maintenance Corp. v. NLRB*, 312 U.S. App. D.C. 260, 56 F.3d 224, 229 (D.C. Cir. 1995)), we find the lawsuit's complete lack of merit together with Petrochem's effort to obtain treble damages sufficient to support the Board's

finding of retaliatory motive. Of course, were the circumstances different – for example, had the suit not been so meritless – our view might be different. *See NLRB v. International Union of Operating Engineers, Local 520*, 15 F.3d 677, 679-80 (7th Cir. 1994) (finding that although the employer's original lawsuit was ultimately dismissed on the basis of a privilege and so was deemed meritless under *Bill Johnson's*, the suit was not retaliatory because it was not entirely without merit). But on the facts of this case, we have no basis for upsetting the Board's determination that Petrochem filed suit in retaliation for the unions' exercise of section 7 rights.

Last, Petrochem challenges the requirement that it "reimburse the Unions for all legal and other expenses incurred in defending against [Petrochem's] lawsuit." 1999 WL 1065426 at *7. Section 10(c) of the NLRA authorizes the Board, upon finding an unfair labor practice, to "take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). Not only does the Board have broad discretionary power under this section to fashion remedies that effectuate the policies of the Act, but the Board's exercise of its discretion is subject to quite limited judicial review. *See Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 216, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964). We will not disturb a remedy ordered by the Board "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *See Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540, 87 L. Ed. 1568, 63 S. Ct. 1214 (1943).

Petrochem argues that the fee award violates the "American rule," under which "attorney's fees are not

ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 18 L. Ed. 2d 475, 87 S. Ct. 1404 (1967). As the Board correctly explains, however, the fee award in no way conflicts with the American rule because the award responds not to the company's loss of its suit, but to the fact that the suit itself amounted to an "illegal act." *See Local 32 B-32J, Serv. Employees Int'l Union v. NLRB*, 314 U.S. App. D.C. 280, 68 F.3d 490, 496 (D.C. Cir. 1995) (finding that an award of attorneys fees did not violate the American rule because the litigation that the fees were incurred in defending against was itself illegal); *Gibson Greetings, Inc. v. NLRB*, 311 U.S. App. D.C. 314, 53 F.3d 385, 394 (D.C. Cir. 1995) ("The NLRB can award a union the costs and fees it incurs in defending against an employer's baseless, retaliatory lawsuit . . . if it determines that the filing or maintenance of the lawsuit was an unfair labor practice."). Indeed, *Bill Johnson's* expressly authorizes the Board to award attorneys' fees in just such situations: "If [a labor law] violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses." 461 U.S. at 747.

IV

We deny Petrochem's petition for review and grant the Board's cross-application for enforcement.

So ordered.

NATIONAL LABOR RELATIONS BOARD

Petrochem Insulation, Inc. and Northern Nevada Pipe Trades Council No. 51, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Thomas J. Hunter, and Locals 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

Case 20-CA-24071

November 19, 1999

DECISION AND ORDER

By John C. Truesdale, Chairman; Sarah M. Fox, Member; Wilma B. Liebman, Member.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

The General Counsel of the National Labor Relations Board filed a complaint and an amended complaint on May 31 and June 25, 1996, respectively, alleging that the Respondent violated Section 8(a)(1) of the Act. The Respondent filed answers admitting in part and denying

in part the allegations of the complaints and raising certain affirmative defenses.

On October 9, 1996, the General Counsel filed a Motion for Summary Judgment and brief in support, with exhibits attached. The General Counsel submits that the Respondent's answers raise no bona fide issues of fact requiring a hearing. On November 29, 1996, the Respondent filed an opposition to the motion and a Cross-Motion for Summary Judgment in its favor, with exhibits attached. The General Counsel filed a response to the Respondent's Cross-Motion for Summary Judgment and reply brief. The Charging Parties filed a reply brief in support of the General Counsel and in opposition to the Respondent's Cross-Motion for Summary Judgment, and the Respondent filed a brief in reply to the General Counsel and Charging Parties.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motions for Summary Judgment

The principal issue in this case is whether the Respondent violated Section 8(a)(1) by filing and maintaining a civil lawsuit against the Charging Party Unions

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[1] The Respondent filed a motion to strike the Charging Parties reply brief on grounds that a 13-page affidavit attached to the brief is "nothing more than legal argument," which extends beyond the 50-page limitation established by the Board. The Charging Party filed an opposition to the Respondent's motion. The matters set forth in the affidavit were not considered in deciding the issues presented here and, therefore, we find it unnecessary to pass on the Respondent's motion.

in Federal district court. The General Counsel and the Unions contend that the Respondent's suit lacked merit because it was dismissed by the District Court with prejudice, and the order was upheld on appeal. The General Counsel and the Unions further argue that the Respondent brought this suit against the Unions in retaliation for their having engaged in activities protected by Section 7 of the Act. Because the suit lacked merit and was filed for retaliatory purposes, the General Counsel and the Union urge that, under *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983), the Board should find that it was unlawfully filed and maintained, and should require the Respondent to reimburse the Unions for attorneys' fees incurred as a result of the suit.

The Respondent contends that its suit was lawful because, in its view, (1) the Union's actions that were the subject of the suit were not protected by Section 7; (2) the suit had a reasonable basis in fact and law; and (3) the suit was not filed with a retaliatory motive. The Respondent also contends that even if it violated the Act the Board should not require it to pay the Unions' attorneys' fees.

On the basis of the Respondent's admission of relevant allegations in the complaints, as well as other factual admissions made in its briefs, we find that there are no material issues of fact warranting a hearing and that as a matter of law the Respondent has violated Section 8(a)(1) as alleged. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny the Respondent's cross-motion.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Petrochem Insulation, Inc., a California corporation with an office and place of business in Vallejo, California, is a mechanical insulation contractor specializing in power plant and industrial construction. During the 12-month period ending June 20, 1991, the Respondent purchased and received at its Vallejo, California facility goods valued in excess of $ 50,000 directly from points outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that each of the Unions is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent is a nonunion construction firm that performs construction and maintenance work for power plants and other industrial entities in the northern California area. The Respondent claims that beginning in 1988, the Unions commenced a campaign to cause its contractors to perform work for them and "to [decline] to allow Petrochem to bid for or perform certain projects for them because Petrochem was not a signatory to a union collective bargaining agreement." According to the complaints filed by the Respondent in Federal court, the

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[2] District Council No. 51 was dissolved effective December 31, 1995.

Unions' campaign consisted of filing, and threatening to file, environmental impact objections to projects on which the Respondent was a contractor, intervening in state permit proceedings and objecting to the issuance of permits "in order to delay and frustrate developers" of those projects, and petitioning "relevant administrative bodies, and ultimately the courts, with a large number of objections" regarding air quality permits.

On December 20, 1990, the Respondent filed suit in the U.S. District Court for the Northern District of California alleging that the Union's conduct constituted a conspiracy to "extort developers of [certain large energy-production facilities] to enter into and adhere to unlawful hot cargo and union project agreements" in violation of the Racketeering Influence and Corrupt Organization Act (RICO).[3] The complaint included a demand for treble damages. The district court granted the Unions' motion to dismiss the complaint, finding that the RICO claims were preempted by the Act.[4]

The Respondent then requested leave to file an amended complaint which realleged the above-described conduct, this time claiming that the Unions violated the Sherman Antitrust Act,[5] in addition to RICO. The district court found the first amended complaint facially inadequate and denied leave to file it. However, the Respondent was permitted to file a second amended complaint

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[3] 18 U.S.C. § 1962, et al.

[4] *Petrochem Insulation, Inc. v. Northern California Pipe Trades Council*, 137 LRRM 2194 (N.D.Cal. 1991).

[5] 15 U.S.C. § 1 and 2.

to allege an antitrust claim, provided that the amended complaint was factually explicit as to the following:

(a) The specific identity of, and each party to, each contract, combination, or conspiracy in restraint of trade to which a non-labor group was allegedly a member.

(b) The acts each defendant performed or undertook in furtherance of each contract, combination or conspiracy.

(c) The injury to competition that resulted from each alleged contract.

(d) The geographic and product market allegedly monopolized by any defendant, and the acts each named defendant undertook to pursue monopolization of that market.

Thereafter, the Respondent filed a second amended complaint alleging Sherman Act violations. The Respondent alleged that the Union violated Section 1 of the Sherman Act by conspiring to restrain trade by entering into hot cargo agreements with energy project developers that precluded the Respondent from bidding on the developers' construction projects. The Respondents also alleged that the Unions restrained trade in violation of section 2 of the Sherman Act by filing "sham" petitions and meritless environmental objections to monopolize the relevant market.

The district court dismissed with prejudice the Respondent's second amended complaint.[6] In dismissing the section 1 antitrust claim, the court found that the

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[6] 139 LRRM 2956 (N.D.Cal. 1992).

Respondent "still fails to state a cognizable claim for two independent reasons, each of which has previously been explained to plaintiff, and each of which plaintiff has failed to cure."[7] Specifically, the court found that the Respondent (1) failed to identify the parties to and contents of any alleged contract in restraint to trade and (2) failed to plead the injury to competition that resulted from each alleged contract.

The court dismissed the Respondent's antitrust claim premised on Section 2 of the Sherman Act because it failed to identify the contractors who supposedly combined with the Unions to monopolize the Respondent's market through sham petitioning, and because the complaint failed to allege that the Unions "have threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless."[8] On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the Respondent's complaint with prejudice.[9] Following the Supreme Court's denial of the Respondent's petition for writ of certiorari,[10] the General Counsel filed the instant complaint.

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[7] 139 LRRM at 2961.

[8] 139 LRRM at 2965.

[9] 8 F.3d 29 (1993).

[10] 510 U.S. 1191 (1994).

B. Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) by bringing a meritless suit against the Unions to enjoin them from engaging in protected concerted activity and to recover damages from them. The Board recently considered the same allegation in similar circumstances in *BE & K Construction Co.*, 329 NLRB No. 68 (1999). In *BE & K*, the Board determined that disposition of this issue is governed by legal principles set forth by the Supreme Court in *Bill Johnson's*. The Court in *Bill Johnson's* held that establishing a lack of reasonable basis in fact or law and a retaliatory motive are prerequisites to the Board's enjoining prosecution of a pending lawsuit. The standard is different, however, if the lawsuit has resulted in a final judgment adverse to the plaintiff. Under those circumstances, the Court held that the Board may proceed to consider whether the adjudicated lawsuit was filed with retaliatory intent, and if such intent is present, find a violation of the Act and order appropriate relief.

As discussed above, the district court dismissed the Respondent's lawsuit including the allegation that the Unions' governmental petitioning activity constituted antitrust violations, and the Ninth Circuit affirmed the result. Accordingly, the Respondent's suit lacked merit within the meaning of *Bill Johnson's*.[11] We therefore

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[11] For the reasons set forth in *BE & K, supra*, slip op. at 5-6, we reject the Respondent's argument that *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), altered the Supreme Court's approach to allegedly retaliatory lawsuits under Sec. 8(a)(1) as announced in *Bill Johnson's*.

consider whether the suit was filed with an intent to retaliate against the Unions for engaging in protected activity.

As an initial matter, we must determine whether the Unions' actions were protected from retaliation by Section 7 of the Act. *See Brown Electric Co.*, 324 NLRB 1, 3 (1997). The Respondent makes two general contentions that they were not. It argues that the conduct in question was engaged in by the Unions and therefore did not involve retaliation against employee protected activity. It also contends that, because the Unions did not represent the Respondent's employees, the Act does not protect their actions from a retaliatory lawsuit. The Board addressed identical contentions with respect to the unions' activity in *BE & K*, 329 NLRB No. 68, slip op. at 7-9. For the reasons fully set forth there, we find no merit in the Respondent's contentions.

The Unions' actual conduct at issue here was clearly protected. Their stated objective, set forth in an internal union report entitled "Participation in the Permit Process," was to intervene before state environmental and other regulatory permit proceedings incident to construction projects in northern California in order to "force construction companies to pay their employees a living wage, including health and other benefits."[12] This is a form of area-standards activity which is undisputedly

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[12] This report was attached as an exhibit to the Respondent's second amended complaint.

protected under Section 7. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (area-standards picketing).[13] As the Board explained in *Giant Food Markets*, 241 NLRB 727, 728 (1979), the rationale for protecting such activity is that a union has a legitimate interest in "protecting the employment standards it has successfully negotiated . . . from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards."[14] The Unions' governmental petitioning activity here, which sought to force the Respondent and other nonunion construction companies to pay their employees union-scale wages and benefits, was clearly in furtherance of an area-standards objective of protecting the economic terms of employment enjoyed by the employees they represented. If successful, such efforts would not only expand union job opportunities for current union members but also would improve their ability to bargain for higher wages by mitigating employer resistance based on concerns about being undercut by nonunion competitors.[15] Further, by seeking to ensure that the Respondent or any successful construction project bidder address the environmental considerations with respect to toxic materials and pollution control – the Unions' other

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[13] *See* also *O'Neil's Markets v. NLRB*, 95 F.3d 733 (8th Cir. 1996) (area-standards handbilling).

[14] Although the court of appeals remanded the case to the Board, the court quoted this part of the Board's decision with approval. 633 F.2d 18, 23 fn. 11 (6th Cir. 1980).

[15] *See Electrical Workers IBEW Local 501 v. NLRB*, 756 F.2d 888, 894 (D.C. Cir. 1985), *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976).

stated purpose for participating in the state permit proceedings – they acted in furtherance of the safety and health of all employees who would eventually be employed at a particular work site, including potentially the employees the Unions represented as well as those of the Respondent. That clearly is concerted activity that falls within the "mutual aid or protection" language of Section 7. *See GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989), enfd. 924 F.2d 1055 (5th Cir. 1991).

In its final argument on this issue, the Respondent contends that the Unions' conduct was not protected because it constituted a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the Act. Specifically, the Respondent argues that the Unions participated in and threatened to participate in environmental permit proceedings with the unlawful secondary object of coercing project owners to cease doing business with the Respondent and other nonunion contractors. We disagree.[16]

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[16] Contrary to the General Counsel and the Unions, we find [that] the Respondent is not barred by Sec. 10(b) of the Act from contending that the Unions' conduct was unprotected. Sec. 10(b) provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge." That provision has been interpreted by the Board also to preclude raising, as a defense to a complaint allegation, conduct as to which Sec. 10(b) would bar a complaint if it were alleged as an unfair labor practice. *See*, e.g., *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989), enfd. mem. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992). We find this principle inapplicable in the type of Bill Johnson's setting presented in this case where the General Counsel, as part of his burden in establishing a prima facie violation of Sec. 8(a)(1), must show that the Unions' alleged secondary activity, which occurred outside the 10(b) period, was protected. Because of

The Supreme Court's holding in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568 (1988), precludes finding that the Unions' actions here violated Section 8(b)(4)(ii)(B) and, hence, were unprotected. In order to violate this statutory provision a union must engage in conduct "attended by threats, coercion or restraint."[17] In DeBartolo, the Supreme Court held that Section 8(b)(4)(ii)(B) does not cover peaceful handbilling because such activity, unlike picketing, accomplishes its goal by the persuasive force of the ideas it conveys, rather than by coercion, intimidation, or restraint. *Id.* at 580. The Court explained that handbilling, unlike picketing or striking, involves behavior solely of a speech-related nature and, therefore, to conclude that it is unlawfully coercive would pose "serious questions of the validity of Section 8(b)(4) under the First Amendment." *Id.* at 576. Accordingly, because the secondary activity in DeBartolo involved handbilling only, unaccompanied by violence, picketing, patrolling, or a strike, the Court concluded that the union's handbilling therein was not coercive in violation of Section 8(b)(4)(ii)(B).

Here, rather than handbilling, the Unions petitioned state governmental agencies in furtherance of what the Respondent contends was an illegal secondary object. We agree, however, with the Fifth Circuit in *Brown & Root, Inc. v. Louisiana State AFL*, 10 F.3d 316, 326 (1994), that governmental lobbying by a union "like handbilling, is

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this required showing the Respondent cannot be precluded from asserting facts otherwise barred by Sec. 10(b) in countering the General Counsel's case.

[17] *See NLRB v. Servette, Inc.*, 377 U.S. 46, 54 (1964).

activity protected by the First Amendment." Indeed, the right to petition a legislative body falls squarely under the "umbrella of 'political expression.' "[18] Accordingly, in order to avoid the potentially serious First Amendment problems that would result if the Unions' governmental petitioning were found to constitute "coercion" under Section 8(b)(4)(ii)(B), we shall follow DeBartolo and conclude that such conduct is lawful and, hence, protected by the Act.

In so holding, we find it unnecessary to decide whether the Unions' petitioning could be found to be coercive for 8(b)(4) purposes if, as the Respondent alleges, the Unions had filed, or threatened to file, "sham" petitions and meritless environmental objections with a secondary objective. As we have noted above, the Respondent alleged in its lawsuit that the Unions had violated section 2 of the Sherman Act by filing such petitions and objections. But the court dismissed that claim because it found that, despite its instruction to identify the Unions' actions that allegedly constituted monopolization, the Respondent had failed to allege that the Unions had "threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless."[19] In view of its failure to identify in the court proceeding any example of the type of Union conduct that it contended then, and contends now, was unlawful, we infer that the Respondent was unable to

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[18] *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 512-513 (1972).

[19] 139 LRRM at 2965.

produce any such evidence before the court and would be equally unable to do so before the Board. Because there is no support for the Respondent's contention that the Unions filed their petitions and objections without regard to their merits, we find that the Unions' conduct did not violate Section 8(b)(4)(B) and therefore did not lose its protected character.[20]

Having found, in light of the federal court's dismissal of the Respondent's lawsuit, that the suit was meritless under *Bill Johnson's*, the remaining question in determining whether the lawsuit violated Section 8(a)(1) is whether it was filed for retaliatory reasons. Although we find no direct evidence in this regard, we note that "motive or intent almost always must be inferred from circumstantial evidence."[21] Here, we infer a retaliatory motive behind the Respondent's lawsuit based on the following circumstantial evidence.

First, it is evident from the complaint allegations of the Respondent's lawsuit that it was filed in direct response to the Union's participation in the state environmental permit proceedings. As found above, that conduct

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[20] Because this is a summary judgment proceeding, we are required to evaluate the evidence in the light most favorable to the nonmoving party. In order to grant the General Counsel's motion and find the 8(a)(1) violation, then, we must view the facts in the light most favorable to the Respondent. That does not mean, however; that we have to accept as true; for the purposes of ruling on the General Counsel's motion, factual contentions raised by the Respondent that have already been rejected by the court.

[21] *Gesice & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1375 (7th Cir. 1997).

was protected by Section 7 of the Act. Since the lawsuit was "aimed directly at [this] protected activity," and necessarily tended to discourage future Section 7 activity of this kind, it was, by definition, retaliatory within the meaning of *Bill Johnson's*.[22]

Our conclusion that the lawsuit was driven by retaliatory considerations can also be inferred from the treatment the Respondent's lawsuit received by the Federal court. As stated by the Court in *Bill Johnson's*, where an employer's suit is found without merit, "the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' [Sec.] 7 rights."[23] Doing so here, we note that the Respondent's lawsuit was found not just to have lacked merit – that would be a charitable characterization of its outcome. The lawsuit's claims did not even get to a jury pursuant to the Respondent's demand because it was unable to plead a legally cognizable cause of action, notwithstanding that the district court provided the Respondent three opportunities to do so. This degree of failure "undermines [the Respondent's] claim that it filed the suit to defend its legally protectable interests"[24] and demonstrates instead its retaliatory purpose.

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[22] *H.W. Barss*, 296 NLRB 1286, 1287 (1989): *Phoenix Newspapers*, 294 NLRB 47, 50 (1989); *BE & K Construction*, 329 NLRB No. 68, slip op. at 10-11.

[23] 461 U.S. at 747.

[24] *Diamond Walnut Growers v. NLRB*, 53 F.3d 1050, 1090 (9th 1995).

Finally, that the Respondent's suit was filed with a retaliatory motive can be inferred, in part, from the treble damages it sought from the outset as compensation for its alleged losses. The Respondent asserts that treble damages are statutory components of RICO and antitrust claims and, as such, cannot be evidence of motive. We disagree. It was the selection of the RICO and antitrust claims, with their provisions for treble damages, which underscores the Respondent's retaliatory intent. The Respondent had available a less drastic means of recovering its alleged losses; it could have filed suit in Federal district court under Section 303 of the Act to recover its actual damages by alleging as unlawful what it now argues was unprotected conduct, i.e., that the Unions' conduct violated Section 8(b)(4),[25] Instead, its RICO and antitrust claims constituted an attempt to obtain three-times its actual damages. In comparable circumstances

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[25] *See Longshoremen & Warehousemen v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

Sec. 303 provides that

> (a) It shall be unlawful, for the purpose of this section only . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the . . . Act.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

where an employer has sought punitive damages in addition to alleged actual damages, the Board has inferred retaliatory intent.[26] We draw the same inference here.

CONCLUSION OF LAW

By filing and prosecuting a Federal court lawsuit against the Unions and their agents with causes of actions which were without legal merit and were motivated by an intent to retaliate against the Unions' protected concerted activity on behalf of its members and other employees, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reimburse the Unions for all legal and other expenses incurred in defending against the Respondent's lawsuit, plus interest as computed in *New Horizons for the Retarded,*

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[26] *Summitville Tiles, Inc.*, 300 NLRB 64, 66 (1990); *H.W. Barss*, 296 NLRB at 1287-1288.

Several courts of appeals have also viewed antitrust treble damages as punitive damages. *See Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir. 1955) ("Two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose."); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir. 1954); *Kline v. Coldwell Banker & Co.*, 50B F.2d 226, 235 (9th Cir. 1974).

283 NLRB 1173 (1987); and *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835-836 and fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).[27]

ORDER

The National Labor Relations Board orders that the Respondent, Petrochem Insulation, Inc., Vallejo, California, its officers, agents, successors, and assigns, shall

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[27] The Supreme Court in *Bill Johnson's* expressly authorized the Board to award attorneys' fees and other expenses to employees who had been sued in violation of Sec. 8(a)(1). 461 U.S. at 747. The Respondent however, citing *Summit Valley Industries v. Carpenters Local 112*, 456 U.S. 717 (1982), contends that the Board has no authority under *Bill Johnson's* to order reimbursement to the Unions because it contravenes the "American Rule" which generally precludes the award of attorneys' fees in legal proceedings. Consistent with *Bill Johnson's*. we reject that contention. In so doing, we stress that an award of attorneys' fees is appropriate, not because the Respondent did not prevail in its district court litigation against the Unions, but because it was the Respondent's lawsuit itself that was unlawful. *See Service Employees SEIU, Local 32 B-32J v. NLRB*, 68 F.3d 490, 496 (D.C. Cir, 1995). *See* also *Geske & Sons*, 103 F.3d at 1378. Accordingly, the "American Rule" does not prevent us from awarding the Unions attorneys' fees.

As noted above in fn. 2, District Council No. 51 was dissolved in December 1995. The Respondent contends that the dissolution renders moot any remedy sought on behalf of that Union. In response, the General Counsel asserts that the District Council's rights and obligations, including its claim for reimbursement of attorneys' fees, were assumed by various Local affiliates pursuant to the terms of dissolution and that the remedy originally sought on behalf of District 51 is, therefore, not more. This is a matter which we shall leave to the compliance stage.

1. Cease and desist from

   (a) Filing and prosecuting lawsuits with causes of actions against the Unions that are without legal merit and are motivated to retaliate against activity protected by Section 7 of the Act.

   (b) In any like or related manner interfering with, restraining, or coercing, employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Reimburse the Unions for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the manner set forth in the remedy section.

   (b) Within 14 days after service by the Region, post at its facility in Vallejo, California, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall

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[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expenses, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 1990.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

Dated, Washington, D.C. November 19, 1999

John C. Truesdale, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT file and prosecute lawsuits with causes of actions against the Unions that are without legal merit and are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Unions for all legal and other expenses incurred in the defense of our lawsuit, plus interest.

PETROCHEM INSULATION, INC.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETROCHEM INSULATION, INC., Plaintiff-Appellant, v. UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE UNITED STATES & CANADA, LOCAL UNION NO. 38, AFL-CIO; THOMAS R. ADAMS; ADAMS & BROADWELL; THOMAS J. HUNTER; NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Council 51, et al.; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 437, 444, 447, 460, 471, 483, 492, 503 AND 662, Defendants-Appellees. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 302, amicus, Amicus.

No. 92-15511

August 12, 1993, Argued, Submitted,
San Francisco, California
September 24, 1993, Filed

NOTICE: THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-90-03628-EFL. Eugene F. Lynch, District Judge, Presiding

DISPOSITION: AFFIRMED.

JUDGES: Before: KOZINSKI, THOMPSON, and T.G. NELSON, Circuit Judges.

OPINION: MEMORANDUM

A. Antitrust Section 1 Claim

We have held that failure to allege injury to competition is a proper ground for dismissing a § 1 claim. *Alliance Shippers, Inc. v. Southern Pac. Transp. Co.*, 858 F.2d 567, 570 (9th Cir. 1988). "Indispensable to any section 1 claim is an allegation that competition has been injured rather than merely competitors." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) (emphasis in original); *see also Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 507-08 (9th Cir. 1989) (affirming 12(b)(6) dismissal for failure to state a § 1 antitrust claim because plaintiff failed to allege an unreasonable restraint of or injury to competition).

Petrochem has failed to allege injury to competition. Rather, it merely alleges injury to its own business, either because it was denied the opportunity to bid on certain projects, or because it was not awarded certain contracts. An allegation of injury to its own business interests alone is not enough to establish injury to the market as a whole. *See Les Shockley*, 884 F.2d at 508.

Petrochem marshals three arguments in response. First, it asserts that if four open shop contractors are eliminated, there is a substantial numerical reduction in competition. We rejected a similar argument in *Les Shockley*, reasoning that although removal of one or more competitors from a market necessarily has an effect on

competitive conditions within that market, it is only when such an agreement or other arrangement "becomes unreasonably disruptive of market functions such as price setting, resource allocation, market entry, or output designation" that there may be a potential Sherman Act violation. 884 F.2d at 508. Petrochem does not allege detrimental competitive effects. Mere injury to its own position as a competitor is insufficient to state an antitrust claim. *See id.; see also Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983) ("it is injury to the market, not to individual firms, that is significant") (internal quotations omitted).

Second, Petrochem asserts that this deficiency is overcome because the complaint sufficiently alleges anticompetitive intent. Although intent to harm competition in the relevant market may state a claim for relief under certain circumstances, conclusory allegations are insufficient in the absence of anticompetitive conduct from which such specific intent may be inferred. *Rutman Wine Co.*, 829 F.2d at 735. Petrochem points to the allegations of sham petitioning contained in the complaint and Exhibit 1 as proof of anticompetitive intent. However, the Noerr-Pennington doctrine shields legitimate efforts to use the adjudicative (or the legislative) process to achieve certain goals from antitrust liability regardless of anticompetitive intent or purpose. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1927 (1993). Moreover, Petrochem's sham petitioning claim alleges only unilateral action, and therefore cannot form the basis of its § 1 antitrust claim. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 634 (9th Cir. 1987) ("Independent action does not fall within the ambit

of § 1 of the Sherman Act."). Section 2 of the Sherman Act encompasses unilateral action. *Id.*

Third, despite the pleading deficiencies noted above, Petrochem contends that the district court erred in requiring "an impossible burden of factual specificity" and that it should be allowed to obtain such facts through discovery. Petrochem is mistaken. We have previously stated that a pleader may not evade the § 1 antitrust elements "by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust." *Rutman Wine Co.*, 829 F.2d at 736 (internal quotations omitted) (affirming 12(b)(6) dismissal because complaint failed to allege injury to competition); *see also Les Shockley*, 884 F.2d at 507-08 (same).

Petrochem cites Beltz Travel Serv., Inc. v. International Air Transp. Ass'n, 620 F.2d 1360, 1366 (9th Cir. 1980), to support its proposition that discovery may be the only method by which the facts underlying an alleged agreement would be revealed. Beltz does not relieve Petrochem of its burden to present factual allegations. In *Beltz*, the complaint alleged numerous acts of the defendants which were in furtherance of the conspiracy and it established the three § 1 prerequisites necessary to state a § 1 claim. *Id.* at 1365. The complaint and affidavit in *Beltz* also set forth all the facts regarding the objectives and accomplishments of the conspiracy. *Id.* at 1365-66.

Petrochem also complains that it should not be "punished" because it was unable to obtain written agreements as to each and every conspiracy and that without

such agreements it could not outline the specific details of those agreements. It is true that the district court's order granting leave to amend stated that Petrochem was to identify the agreements, parties, and terms to the extent possible as well as attach the agreements, if they were in Petrochem's possession. The complaint was not dismissed because the agreements were not attached. Rather, it was dismissed because there was insufficient factual support to indicate that such agreements did in fact exist.

B. Antitrust Section 2 Claim

Petrochem's complaint fails to allege that the defendants possess monopoly power in the relevant market, one of three prerequisites for establishing a monopolization claim under § 2. *See Rutman Wine Co.*, 829 F.2d at 736. Petrochem defined the relevant market as a pipe and insulation subcontracting market located in Northern and Central California. Petrochem has failed to allege that the defendants possess monopoly power in that market. The defendants' alleged activities under Petrochem's § 2 claim are unilateral. Because the defendants do not possess a share of the relevant market, their actions alone cannot achieve monopoly power.

Similarly, Petrochem has failed to allege the requisite elements of an attempted monopolization claim. *See id.*

C. Alleged RICO Violation[1]

Because Petrochem has failed to establish a violation of the LMRA, § 186, there is no predicate act upon which to base a RICO claim. Section 186 prohibits an employer from paying money to a union. *See* 29 U.S.C. § 186; *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund for Northern Ca. (ABC)*, 700 F.2d 1269, 1274 (9th Cir.), cert. denied, 464 U.S. 825 (1983). A violation of § 186 serves as a predicate act under the RICO statute, 18 U.S.C. § 1961(1)(C). However, the LMRA provides an exception to § 186 which "permits an employer to transfer money to a union if: (1) the money is in payment of membership dues; (2) the employer has received a valid written authorization from the employee; and (3) the money is deducted from wages." *ABC*, 700 F.2d at 1274 (emphasis in original).

Petrochem's complaint alleges facts which establish the first and third elements of the exception, i.e., that BIDS is funded with money in payment of membership dues and that the money is deducted from wages:

> BIDS . . . is funded by money taken out of membership dues and transmitted to Defendants by employers pursuant to a dues check-off procedure. . . . [BIDS is] a sales program, funded by dues, funneled through District Council 51, and paid to the Council by union contractors payroll deductions.

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[1] In an order filed August 6, 1993, we dismissed Petrochem's RICO extortion claim because Petrochem waived the issue when it failed to include that claim in its amended complaint. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

Further, Petrochem does not allege that the employers did not receive valid written authorizations from employees. Petrochem has failed to allege a predicate act upon which to base its RICO claim.

Petrochem contends that the funds transferred to the union for the BIDS program are not "membership dues" because the union does not use those dues for permissible purposes, such as organizing activities, contract bargaining or working condition and wage issues. Petrochem asserts that BIDS has two improper uses: (1) collection of project data in order to track projects in the permit stage; and (2) circulation to union contractors information as to those construction projects.

We rejected a similar argument in *ABC*. In that case, ABC argued that the union used part of the revenue from "supplemental dues" for impermissible political purposes, i.e., to hire organizers to combat the open shop movement in the construction industry and to discourage employers from going non-union. *ABC*, 700 F.2d at 1275. ABC contended that because membership dues were used for improper political purposes, they were "not in payment of membership dues," and thus there was a LMRA violation. *Id.* We disagreed, holding that the First and Fourteenth Amendments do not proscribe a union's expenditure of dues revenue for political purposes unless the employees who pay those dues affirmatively object to that union's use of their dues. *Id.* ("Money spent on organizing to eliminate competition from non-union employers is germane to collective bargaining and therefore is not a 'political' expenditure for purposes of first amendment analysis.').

Similarly, the dues in this case are used for organizing to eliminate competition from non-union employers. The two uses Petrochem challenges, collecting and circulating project data, help the union shops organize and compete for those projects. Hence, the district court properly dismissed Petrochem's RICO claim because absent the LMRA violation, there is no predicate act upon which to base this claim.

AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETROCHEM INSULATION, INC., Plaintiff, vs. NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Counsel 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER, Defendants.

No. C-90-3628 EFL

March 19, 1992, Decided
March 19, 1992, Filed; March 24, 1992, Entered

DISPOSITION: DISMISSED WITH PREJUDICE

JUDGES: LYNCH

OPINION BY: EUGENE F. LYNCH

OPINION: MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The above-captioned matter came before this Court pursuant to defendants' motion to dismiss plaintiff's second amended complaint. In that complaint, plaintiff has attempted to assert five claims for relief. Plaintiff's first claim for relief alleges an antitrust violation regarding "hot cargo agreements." Plaintiff's second claim alleges

that defendants monopolized the insulation subcontracting market through "sham petitioning" of certain governmental proceedings. Plaintiff's third, fourth and fifth claims allege RICO violations relating to certain union "dues checkoff" procedures.

Plaintiff and defendants vigorously dispute whether or not this action may be characterized as a "SLAPP" suit, or a "Strategic Lawsuit Against Public Participation." In other words, plaintiff contends that the defendants have abused certain administrative permit granting processes by making baseless environmental objections in an effort to force project owners to boycott non-union contractors. Defendants, on the other hand, contend that plaintiff's suit infringes on their first amendment right to participate in public hearings and administrative proceedings. Accordingly, this case implicates important issues of public policy.

BACKGROUND

Plaintiff's second amended complaint represents plaintiff's third effort to state a cognizable complaint attacking defendants' participation in public governmental permit proceedings. Plaintiff's initial complaint asserted that a RICO conspiracy existed between nineteen local unions, a district council, the council's business manager, its attorney, and his law firms. In essence, the original complaint alleged that the conspirators participated in the permit process to extort union-only project agreements from construction developers, resulting in a violation of Section 8(e) of the National Labor Relations Act ("NLRA"). The Court granted defendants' motion to

dismiss that complaint without leave to amend, finding that plaintiff's RICO claims were preempted by the NLRA.[1] At that time, plaintiff requested leave to file an amended complaint alleging antitrust violations based on union-only project agreements. The Court allowed plaintiff to file a motion for leave to file such an amended complaint, which plaintiff attempted, adding a new theory of RICO violation as well, based upon certain employers' transmittal of union dues in violation of 29 U.S.C. § 186.[2]

The Court found the first amended complaint facially inadequate, and denied leave to file it. The Court did allow plaintiff 45 days to file a second amended complaint, but specifically cautioned plaintiff that any RICO claims would have to conform to the Court's Standing Order regarding RICO claims, and that any antitrust claims would have to be plead with specificity. Plaintiff filed a second amended complaint, and the defendants have brought the instant motion to dismiss. The Court

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[1] *See* Order Dismissing Complaint Without Prejudice, entered April 30, 1991 ("April 30 Order"). The Court held that plaintiff's RICO claims were preempted by the NLRA because the predicate act alleged, criminal extortion, was founded upon a violation of the NLRA which confers jurisdiction on the National Labor Relations Board.

[2] At the time it moved for leave to amend, plaintiff also moved for reconsideration of the Court's initial dismissal of the RICO extortion claims; for amendment of its original complaint nunc pro tunc to add antitrust claims; and for certification of the ruling on the RICO extortion claims as a partial final judgment under Rule 54(b). The Court denied each of these motions. *See* July 30 Order at 2.

will consider the plaintiff's RICO claims first, and then turn to the plaintiff's antitrust claims.

RICO CLAIMS

1. Plaintiff's Predicate Act Is Legal.

Plaintiff's allegations of RICO violations stem from a program known as "BIDS" ("Bidder Information and Directory Service"), a program through which unions collect information about new or proposed construction projects. Plaintiff alleges that the unions supply such information to union personnel for assistance in organizing, and to union contractors to facilitate bidding for projects that will then employ union labor. Plaintiff does not contend that it has ever lost a project as a result of BIDS, nor that any acts undertaken by BIDS are illegal, but rather that the way BIDS is funded violates labor laws. Specifically, plaintiff asserts that BIDS is funded by money taken from membership dues and transmitted to defendants via a checkoff procedure in violation of 29 U.S.C. § 186. That violation, in turn, serves as the predicate act for plaintiff's RICO claims.

Section 186 generally prohibits payments by employers to labor organizations or their representatives, with nine enumerated exceptions. One of those exceptions states that "the provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization. . . . " 29 U.S.C. § 186(c)(4) ("union dues exception"). This exception recognizes that dues, while often transmitted for convenience by employers directly to a union pursuant to a checkoff

procedure, are actually payments to the union from employees, and not employers.[3]

Nonetheless, plaintiff alleges that the union dues exception does not apply because of the uses to which the dues are put. Those alleged uses are: (1) the collection of project data and its distribution to union organizers and contractors; (2) the organizing of employees of non-union contractors; and (3) combatting the open shop movement. Thus, according to the plaintiff's theory, these payments are not union dues within the meaning of § 186 because the funds are not spent on negotiation, collective bargaining, or union organizing of employees of non-signatory companies.

Under the Ninth Circuit's precedent in *Associated Builders & Contractors v. Carpenters Vacation & Holiday Trust Fund*, 700 F.2d 1269 (9th Cir.), *cert. denied*, 464 U.S. 825, (1983) [hereinafter "ABC" plaintiff's argument is misguided:

> [plaintiff] argues first that the monies transferred to the Union as 'supplemental dues' are not in payment of 'membership dues' because the Union uses part of the revenues from such supplemental dues for 'political' purposes, that

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[3] Plaintiff's allegations make clear that the subject funds are within the union dues exception:

> "The BIDS program . . . is funded by money taken out of membership dues and transmitted to Defendants by employers pursuant to a dues check-off procedure. . . . [the BIDS program is] funded by dues, funnelled through District Council 51, and paid to the Council by union contractor's payroll deductions." Complaint at para. 95, emphasis added.

> is, to hire organizers to combat the 'open shop' movement in the California construction industry and to discourage employers from going non-union. [Plaintiff] contends that since 'membership dues' cannot be expended for political purposes, the money deducted here is not 'in payment of membership dues' and thus Lloyds is prohibited by [§ 186] from transferring such monies to the union. We disagree. *Id.* at 1275.

Accordingly, the Ninth Circuit held that dues check-off funds used for organizing non-union labor and promoting union labor were within the union dues exception and in no way prohibited by § 186. *Id.* at 1274-75.[4]

The Court finds this precedent squarely controlling, and in light of the ABC case, plaintiff's RICO claims must be DISMISSED. As the court in ABC noted, "money spent on organizing to eliminate competition from non-union employers is germane to collective bargaining. . . . " *Id.* at 1275.

Additionally, plaintiff's theory finds no support in the text of the labor statute plaintiff attempts to rely upon. Section 186 in no way limits how such dues may be spent. Moreover, in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court considered

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[4] The Court stated that: "an expenditure is considered 'political' for purposes of first amendment analysis only if it is not germane to the union's work in the realm of collective bargaining. *Ellis*, 685 F.2d at 1072-73. Money spent on organizing to eliminate competition from non-union employers is germane to collective bargaining and therefore is not a 'political' expenditure for purposes of first amendment analysis." *ABC*, 700 F.2d at 1275.

the ramifications of restrictions on the use of union dues. With respect to dues collected from union members, Beck confirmed that congress viewed as permissible the full use of union dues, including allocation to activities other than collective bargaining. *Id.* at 756.

Plaintiff argues, however, that Beck and two other recent cases, *Lehnert v. Ferris Faculty Association*, ___ U.S. ___, 111 S.Ct. 1950 (1991) and *Lucid v. City and County of San Francisco*, 774 F. Supp. 1234 (N.D. Cal. Oct. 28, 1991) support plaintiff's argument that the misallocation of money collected as dues but not used for collective bargaining within the bargaining unit violates the law. Those cases, however, are inapplicable. Each of those cases involved state statutes that compelled employees in a union shop who did not wish to join the union to nonetheless pay a "service" or "agency" fee. The theory behind such statutes is that each employee enjoys the workplace benefits secured by virtue of the union's collective bargaining efforts. In such situations, a balance must necessarily be achieved between that legitimate goal and the first amendment rights of employees to be free from compelled support of the union. As a result, service fees may be collected and disbursed only in connection with collective bargaining activities. In the present case, however, only dues from union members are involved, and case law regarding the legitimate uses to which the service fees of non-members may be put are inapplicable.[5]

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[5] Also, plaintiff cites a case by the Wage Appeals Board of the U.S. Department of Labor as support for the proposition that monies spent targeting jobs cannot be considered dues. *Building*

In sum, then, the practices alleged by plaintiff in this case are lawful under § 186. Since plaintiff's RICO claims are premised solely upon alleged violations of § 186, plaintiff's RICO claims must be DISMISSED.

2. Plaintiff Lacks Standing.

In addition, the Court has determined that there are two other premises upon which the Court could base the dismissal of plaintiff's RICO claims. First, even assuming a violation of § 186 were properly alleged, plaintiff would nonetheless suffer from a lack of standing to make such an assertion. Section 186 prohibits payments by employers to labor organizations to inhibit corrupt practices through which labor representatives might be induced to betray their trust to their constituents. *See, e.g., Maxwell v. Lucky Constr. Co.*, 710 F.2d 1395, 1398 (9th Cir. 1983). As a result, the only parties with a judicially cognizable interest in the enforcement of § 186 are the paying employers, the unions, their representatives or trustees, and their constituent employees. Plaintiff, who is none of these, has no standing to challenge an alleged violation.

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and Construction Unions Job Targeting Programs, 37 Constr. Labor Rpt. (BNA) 908 (1991). That case, however, merely concerns the legality of certain deductions because they resulted in employees' wages going below levels mandated by state law. Thus, plaintiff garners no real support from that case. In that case, because an individual employee sees no actual benefit from funds directed to the job targeting program, the money withheld must be considered a deduction and not a fringe benefit, triggering scrutiny of whether the resulting wage falls below mandated levels.

A case that has directly addressed this issue is *Hibernia Bank v. International Brotherhood of Teamsters, etc.*, 411 F. Supp. 478 (N.D. Cal. 1976). In that case, this Court quoted from *Employing Plasterers' Ass'n v. Journeymen, Plasterers' Protective & Benevolent Soc.*, 279 F.2d 92, 99 (7th Cir. 1960):

> "The right to test the legality of employer contributions . . . is available to employees and employers as well as to such other parties as may be directly concerned with the payment, acceptance, and administration of the [funds at issue]." *Hibernia Bank*, 411 F. Supp. at 484.

The Court found the following to be an "apparently exhaustive enumeration of the basic categories of potential plaintiffs who have standing to sue under" § 186: (1) employers who make the payments; (2) unions whose representatives receive the payments; (3) the employees represented by such unions; and (4) the trustees of such unions. *Id.* at 485. This Court today affirms this approach, and holds that plaintiff lacks standing. If anything, it is the activities of the BIDS program, and not its manner of funding that has had any potential affect on plaintiff. Plaintiff has not provided this Court with any explanation of how any alleged violation of § 186 has resulted in a loss to plaintiff.[6] As mentioned earlier, plaintiff has not alleged that it has ever submitted a low bid that was not

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[6] Thus, it would appear that plaintiffs in the instant case are even further removed from standing than the bank that sought, and was denied, standing in *Hibernia*. In that case, the bank had handled the deducted funds and suffered a loss due to an overdraft.

accepted nor alleged any other damage linked to any purported violation of § 186.

Plaintiff argues, however, that standing in RICO cases must be broadly construed. However, *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985) reiterates that the compensable injury is the harm caused by the predicate act. Without a predicate act and harm that has been proximately and legally caused by that act, a RICO claim cannot proceed. *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1467-68 (9th Cir. 1990). *See also National Enterprises, Inc. v. Mellon Financial Services Corp. Number 7*, 847 F.2d 251, 254 (5th Cir. 1988) (because plaintiff lacks a cognizable injury resulting from the RICO conduct, plaintiff lacks standing to bring suit). Thus, in the final analysis, plaintiff's RICO claim is that BIDS is funded from the wrong source in violation of § 186. Any injury, however, does not result from the source of the funds, but rather results ostensibly from the presence of the program itself. Plaintiff is neither the source of nor recipient of any such funds, and without such causation, plaintiff lacks standing, providing the Court with an additional basis upon which dismissal could be premised.

3. Failure to Comply With Court Orders.

Finally, this Court finds that there is a third basis upon which this Court may dismiss plaintiff's RICO claims: failure to comply with this Court's previous, specific orders. In its Order of July 30, 1991, this Court cautioned plaintiff that any RICO claims would have to conform with this Court's Standing Order regarding

RICO cases. That Standing Order directs a RICO plaintiff to, inter alia:

> 15. Describe the alleged injury to business or property.
>
> 16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.
>
> 17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable. Standing Order at 5.

Plaintiff's second amended complaint contains no description whatsoever of what injury plaintiff has suffered in its business or property, no description of damages; and no description of the direct causal relationship to the commission of any predicate act. The Court has been enormously patient with the plaintiff, not only entertaining three attempts to make out a RICO claim, but providing guidance to plaintiff in that endeavor. Plaintiff has nonetheless failed to comply with this Court's orders, creating a third basis upon which this Court may dismiss their RICO claims.

In sum, then, plaintiff's RICO claims are HEREBY DISMISSED because the predicate acts complained of are legal; the plaintiff lacks standing; and because plaintiff has failed to comply with this Court's orders.

SHERMAN ACT § 1 CLAIM

Plaintiff's first cause of action is for a violation of § 1 of the Sherman Act arising from defendants' alleged conspiracy and combination with construction project

owners to enter into unlawful "hot cargo" agreements. Again, this claim is predicated on the contention that defendants have entered into union-only project agreements violating § 8(e) of the NLRA, 29 U.S.C. § 158(e). As explained below, plaintiff still fails to state a cognizable claim for two independent reasons, each of which has previously been explained to plaintiff, and each of which plaintiff has failed to cure.

1. Plaintiff Has Not Identified The Parties To And Contents Of Any Contract, Combination Or Conspiracy.

Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies in restraint of trade. 15 U.S.C. § 1. Accordingly, the first step in a § 1 analysis is to determine the identity of the alleged conspirators and the content of the alleged conspiracy. *T. W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 633 (9th Cir. 1987). The identities of the contracting parties and the contents of such agreements determine their legality under a number of well-established precepts. First, under the "statutory exemption," unions are exempt from the antitrust laws unless they combine with non-labor entities. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). Second, while union-only agreements are generally proscribed by § 8(e), such agreements are explicitly authorized for the instant industry by the "construction industry proviso" to § 8(e) when the agreements arise in relation to collective bargaining. 29 U.S.C. § 158(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 648 (1982). Such collective bargaining relationships can be established by a "pre-hire" agreement to use union-only labor,

as authorized by § 8(f) of the NLRA. 29 U.S.C. § 158(f).[7] Thus, by complying with these doctrines, unions who desire project agreements can ensure their legality through the terms of the agreements and the identities of the parties to them.

In this action, after rejecting the inadequate allegations of a contract, combination or conspiracy in the first amended complaint, this Court specifically instructed plaintiff on how plaintiff must allege an antitrust claim:

> (a) The specific identity of, and each party to, each contract, combination, or conspiracy in restraint of trade to which a non-labor group was allegedly a member, and in addition shall conform to the following:
>
> (1) In the event that plaintiff contends any union-only project agreement or other contract is an illegal restraint of trade or part thereof, for each such agreement it shall identify to the extent possible the agreement, each of the parties to it, its terms, and shall attach the agreement, if it is in plaintiff's possession.
>
> (2) In the event that plaintiff contends that any combination or conspiracy to restrain trade exists apart from any contract, plaintiff shall

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[7] Also, an employer who is largely involved in non-construction industries may take advantage of § 8(f) [and enter a pre-hire agreement] if it is sufficiently engaged in construction work at one site. *A. L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853, 856-57 (11th Cir. 1984), cert. denied, 471 U.S. 1075 (1985). Additionally, if a developer acts as its own general contractor, or has subsidiaries or related entities which employ labor in the construction industry, then union-only project agreements are allowed. *Id.* at 857-58.

> identify each combination and conspiracy, shall identify the parties to it by name, shall describe its common scheme, and shall describe the unlawful objective.
>
> (b) The acts each defendant performed or undertook in furtherance of each contract, combination or conspiracy.
>
> (c) The injury to competition that resulted from each alleged contract.
>
> (d) The geographic and product market allegedly monopolized by any defendant, and the acts each named defendant undertook to pursue monopolization of that market. July 30 Order at 2-3.

Clearly, plaintiff has not complied with this Court's instructions for pleading a contract in restraint of trade. Plaintiff refers to four projects for which it was unable to bid, but in none of these cases does plaintiff's allegations suffice to form a cognizable complaint.

First, plaintiff complains that it was unable to bid for one project because "General Electric agreed with Defendants to boycott open-shop contractors." Second amended complaint at paragraph 55. However, plaintiff does not identify a single defendant who so agreed; does not plead the agreement's terms, nor attach a copy of it; nor does plaintiff plead what acts any defendant undertook in furtherance of such an agreement.

Second, plaintiff alleges that it lost an opportunity to bid when a prime contractor known as Gotaverken "signed an agreement prohibiting Gotaverken from using or retaining open-shop contractors." Second amended

complaint at paragraph 60. This assertion, brought verbatim from the first amended complaint, still fails to state with whom the supposed agreement was made; what its terms were; why no copy of this signed document is attached or available or unavailable; or state what acts any defendant undertook in furtherance of it.

Third, plaintiff alleges that "Local 549 . . . coerced GWF into signing a union-only agreement." Second amended complaint at paragraph 65. Local 549, however, is not one of the numerous defendants plaintiff has named. Additionally, plaintiff fails to state whom this alleged project agreement was with; what its terms were; and the roles of defendants.

Finally, plaintiff has contended that it could not bid after Chevron "either signed or agreed to sign a mandatory union-only contract . . . or agreed to retain a general contractor who would be required to sign such an agreement." Second amended complaint at paragraph 73. Again, the parties to the agreement are not identified; its terms are not plead; no copy is attached; and there are no allegations of what acts any defendant undertook in furtherance of the alleged agreement.

Plaintiff is incorrect in characterizing these fundamentals as "evidentiary details" that may be supplied later through discovery. Without such facts as the identities of the parties to the alleged agreement, plaintiff has not adequately plead a violation of the antitrust laws, since union-only agreements are not intrinsically improper. Accordingly, plaintiff, on its third attempt, has failed to set forth necessary elements of a § 1 antitrust

cause of action, and plaintiff's § 1 claim must therefore be DISMISSED.

2. Plaintiff Has Not Pleaded Injury to Competition.

The Court notes that there is a second, independent reason that warrants the dismissal of plaintiff's § 1 claim: plaintiff's failure to plead the injury to competition that resulted from each alleged contract in restraint of trade. *See* July 30 Order at 3. That Order reflects two basic antitrust precepts: (1) where, as here, the rule of reason analysis applies, plaintiff must plead injury to competition; and (2) where, as here, an antitrust claim is alleged against labor entities, labor's "non-statutory exemption" requires heightened pleading of injury to competition.

Under *Ackerman-Chillingworth, Division of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n*, 405 F. Supp. 99, 114-18 (D. Haw. 1975), aff'd 579 F.2d 484, 490 n.7 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979), a § 8(e) violation is not per se an illegal boycott. Accordingly, the rule of reason applies, and a claim must allege that competition has been injured, rather than injury to competitors. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987). Likewise, in *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989), the Ninth Circuit stated that: "This limitation on the reach of the Sherman Act is reflected in our repeated injunctions that section one claimants must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market." That court also noted that

"removal of one or a few competitors need not equate with injury to competition." *Id.*

Plaintiff's second amended complaint, however, alleges injury only to plaintiff. At most, it alleges that plaintiff could not submit bids to four projects out of the approximately 93 projects identified in the complaint. It does not allege that plaintiff actually submitted a low bid, nor that any project awarded plaintiff was withdrawn. But even assuming that plaintiff adequately alleged "injury to itself, its conclusion that competition has been harmed thereby does not follow." *Rutman Wine*, 829 F.2d at 734.

In *Les Shockley*, for example, the plaintiffs alleged that they had been excluded from a particular market. Affirming the district court's dismissal of that amended complaint, the Ninth Circuit held that:

> Ordinarily, the factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstration of the restraint's anticompetitive effects within those markets. Avoiding such market analysis requires proof of actual detrimental competitive effects such as output decreases or price increases. *Les Shockley*, 884 F.2d at 508 (citations omitted).

In much the same manner, the plaintiff in the instant case has failed, in three opportunities, to include factual allegations suggesting that the market for insulation subcontracting has been harmed by the defendants. There are no allegations of output decreases or price increases in the market, nor is there any allegation of any other effect

on the "characteristic or function of a competitive market." *Id.* at 509.[8]

Finally, because plaintiff's antitrust allegations are brought against a labor organization, plaintiff must plead significant injury to competition to avoid the unions' "non-statutory exemption." This judicially fashioned exemption "prevents the antitrust laws from being used to frustrate the primary and legitimate goal of the federal labor law, which is to permit employees to organize and act to improve wages and working conditions." *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (citing *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975)). According to Richards, union-imposed restraints that are designed to improve wages and working conditions are generally shielded by this exemption "unless they produce significant anti-competitive effects apart from those that normally result from elimination of competition over wages and working conditions." *Id.* Plaintiff has failed to allege such significant anticompetitive effects – nothing in the second amended complaint suggests that the exclusion of plaintiff would eliminate any competition beyond whatever advantage plaintiff might derive from not paying union scale wages. Accordingly, because plaintiff has failed to identify the parties to and contents of any

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[8] Plaintiff's claim that the "vast majority" of industrial piping and insulation projects have been performed by subcontractors using union labor is completely insufficient as a market analysis. Such a statement does not equate with the conclusion that the subcontracting market is any less competitive. In fact, the plaintiff's allegations make clear that at least five different union contractors compete in this market:

alleged combination and because plaintiff has not sufficiently pleaded injury to competition, plaintiff's § 1 antitrust claim must be DISMISSED for failure to state a claim.

Plaintiff, however, argues that in the instant case, the rule of reason does not apply, and that any violation of § 8(e) constitutes a per se antitrust violation, for which injury to competition may be presumed. The Court disagrees.

Per se antitrust violations have been found in only exceptional circumstances, and are limited to those agreements or practices whose pernicious effects are so manifest and whose lack of redeeming features so obvious that they may be presumed unreasonable. *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988).[9]

Plaintiff maintains that the rule of reason is inapplicable, because defendants' conduct amounts to a "group boycott." Use of that term, though, is not enough.[10] Boycotts can take a variety of forms and courts will not necessarily apply the per se rule, especially where the impact of the arrangement is not obvious. *Oltz*, 861 F.2d

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[9] Thus, a certain practice can be said to constitute a per se violation only after extensive judicial experience has established that anticompetitive consequences regularly flow from that practice.

[10] The Supreme Court has stated that " 'group boycotts' are often listed among the classes of economic activity that merit per se invalidation under § 1. Exactly what types of activity fall within the forbidden category is, however, far from certain." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-94 (1985) (citations omitted).

at 1445 n.1. Next, the cases plaintiff cites to demonstrate application of the per se rule to group boycotts all involve "horizontal boycotts," situations where one competitor attempts to exclude others on the same level.[11] However, the instant case involves a vertical agreement between a union and a developer who stands at least two levels higher in the production system. In other words, the contracts alleged are not directed at excluding competitors at the level of either the unions or developers. In fact, where courts have considered vertical agreements, per se treatment has regularly been denied. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734-35 (9th Cir. 1987); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 387 (9th Cir. 1978); *R. C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 619 F. Supp. 441, 449 (N.D. Cal. 1985) ("an alleged boycott between vertically related defendants is not per se unlawful"). *See also Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n*, 405 F. Supp. 99, 114-18 (D. Hawaii 1975) aff'd 579 F.2d 484, 490 n.7 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) (section 8(e) violation is not per se illegal boycott).

Plaintiff also asserts that *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616

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[11] Plaintiff cites: *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (retailers induced manufacturer not to sell to competing retailers); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941) (certain manufacturers attempted to induce retailers to boycott competing manufacturers); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (one retailer sought to eliminate another retailer from a particular market).

(1975) requires application of the per se rule.[12] While that case may be distinguished on its facts, the more fundamental flaw with plaintiff's argument is that Connell simply did not speak to the issue of whether or not the rule of reason or the per se doctrine applies in such a case. Rather, the Connell court remanded the action for a determination of whether or not antitrust liability existed, rather than finding the conduct to be a per se violation.[13] Accordingly, as plaintiff has failed to allege any activity that falls within those scenarios justifying per se

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[12] In *Connell*, the Court held that the antitrust laws are applicable, though not necessarily violated by, a general contractor's agreement with a union to exclude any subcontractor who was not a signatory to a standardized multiemployer agreement with the union. In that case, the agreement specifically disclaimed any intent on behalf of the union to organize or represent the contractor's employees in collective bargaining. Additionally, the Connell agreement was not limited to one construction site, but applied to all projects the contractor pursued. Finally, that agreement contained a "most favored nation" clause that guaranteed that each subcontractor would receive the same terms from the union. These factors, not present in the instant case, had the effect of eliminating competition.

[13] Applying this, the Court in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Bldg. and Constr. Trades Council*, 670 F.2d 421 (3d Cir. 1982) held that "an agreement which under Connell is found unprotected by the labor exemption must still be examined under traditional antitrust analysis to determine if it has a sufficient anticompetitive effect to constitute an antitrust infraction. *Id.* at 427. *See also Richards v. Neilsen Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987) ("Connell does not suggest that every violation of Section [8(e)] gives rise to an antitrust suit.").

treatment, the rule of reason applies,[14] and as discussed, plaintiff's § 1 claims must be DISMISSED.

SHERMAN ACT § 2 CLAIMS

Plaintiff has also attempted to plead a violation of § 2 of the Sherman Act, alleging that the defendants used sham petitions and meritless environmental objections to monopolize their market and restrain trade. For three independent reasons, this claim must also be DISMISSED.

1. It Is Legally Impossible For Labor Unions To Monopolize The Pipe And Insulation Subcontract Market.

First, the relevant markets in question, as noted by the plaintiff, are the "construction sub-contract [markets] for the installation of piping and insulation." Defendants, however, are clearly not in the pipe and insulation subcontracting market. Defendants are labor unions that provide workers to contractors and sub-contractors with whom they have collective bargaining agreements. *See Genser v. Int'l Brotherhood of Electrical Workers*, 522 F. Supp. 1153, 1155 (N.D. Ill. 1981) ("the Union's relevant market is labor, not the electrical contracting business; thus the Union could not unilaterally monopolize or attempt to monopolize the electrical contracting market").

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[14] As a practical matter, the Court notes that were plaintiff's activities so clearly an antitrust violation that per se liability could be invoked, plaintiff's initial attempts to fashion a RICO case from those same activities would be largely inexplicable.

Plaintiff's claim could potentially be salvaged were plaintiff able to allege that defendants had conspired to monopolize another market with a participant within that market. *See Richter Concrete Corp. v. Hilltop Basic Resources, Inc.*, 547 F. Supp. 893, 899 (S.D. Ohio 1981), aff'd, 691 F.2d 818 (6th Cir. 1982) ("the fact that [defendant] was not itself engaged in [that business] does not perforce exclude any claim that it conspired with another company that was so engaged . . . "). However, such a claim requires that the unions have conspired with a union contractor or any other participant in the relevant market. The Second amended complaint, though, does not mention any participation by or conspiracy with union contractors or subcontractors in the sham petitioning activity. Without such allegations, the claim for conspiracy to monopolize defendants' market must fail. Vague and conclusory references to unnamed conspirators will not suffice. Plaintiff was made aware of this requirement in this Court's Order of July 30 in which plaintiff was instructed that "plaintiff shall identify each combination or conspiracy, shall identify the parties to it by name, shall describe its common scheme, and shall describe its unlawful objective." Clearly, plaintiff has failed to comply with that Order.

2. Plaintiff Has Failed To Plead The Requisite Involvement Of Non-Labor Groups Necessary To Defeat The Statutory Exemption.

Labor benefits from a "statutory exemption," distinct from the non-statutory exemption discussed earlier, that immunizes union conduct from antitrust laws as "long as a union acts in its self-interest and does not combine with

non-labor groups." *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). If a union aids or abets non-labor groups creating business monopolies or in controlling markets, the exemption is lost; but unions acting alone are beyond the reach of the antitrust laws. *Allen Bradley Co. v. Int'l Brotherhood of Electrical Workers*, 325 U.S. 797, 807-08 (1945); *Bodine Produce, Inc. v. United Farm Workers Organizing Comm.*, 494 F.2d 541, 544-56 (9th Cir. 1974) (tracing history of statutory exemption).

Plaintiff's § 2 claim, however, makes no allegation that defendants have combined with any non-labor group to engage in the sham petitioning upon which the monopolization claim is founded.[15] Plaintiff complains that the unions and their attorneys participated in certain permit proceedings. Without some allegation that non-labor groups were involved in the petitioning activity alleged to constitute a monopoly, that activity is exempt from the antitrust statutes as a matter of law. *See also USS-Posco Industries v. Contra Costa Bldg. & Constr. Trades Council*, 1990 U.S. Dist. LEXIS 11,360 (N.D. Cal. 1990) (allegedly sham challenges to the construction of the UPI plant on environmental grounds fall within the statutory

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[15] Plaintiff's conclusory allegation that defendants are "co-conspirators" with project developers and union subcontractors is simply insufficient. There is no pleading of the actual involvement of any union subcontractor. With regard to the project developers, not only is the pleading insufficient, but the Court is skeptical that any developer would actually file sham petitions against their own projects.

exemption as long as unions did not combine with non-labor groups).[16]

3. Plaintiff Has Failed To Plead Any Meritless Proceeding.

Plaintiff has premised its monopolization claim upon the theory that defendants engaged in sham petitions and baseless environmental objections. The Court cautioned plaintiff in its April 30 Order that the original complaint did not provide adequate factual support for such a claim. Plaintiff's second amended complaint is no improvement. It fails to allege that defendants have threatened or pursued a single meritless objection to any construction project, much less identify that objection or allege why such an objection should be considered meritless.

In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1079-83 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), McDonald's Restaurants sued labor unions and associations of employers in antitrust, alleging that they opposed each permit granted to McDonald's in an attempt to foreclose McDonald's from access to the Board of Permit Appeals. In affirming the district court's dismissal and denial of leave to amend, the Ninth Circuit noted that the complaint fails to adduce any specific facts

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[16] Again, the Court made plaintiff aware of this requirement in its Order of July 30, in which plaintiff was directed to plead the involvement of non-labor groups in order to state an antitrust claim.

to support the conclusory allegation that defendants' opposition before the Board was 'sham' or 'frivolous.' *Id.* at 1079.

Rather, mindful of the important issues of first amendment rights implicated in challenges to public participation, the Franchise Realty court established a procedural rule requiring the pleading of specific facts in such challenges:

> Where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required. *Id.* at 1082-83.

See also Boone v. Redevelopment Agency of San Jose, 841 F.2d 886, 894 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988).

As in *Franchise Realty*, plaintiff has failed to allege facts with particularity. The pleadings with respect to each of the four projects referred to by plaintiff earlier are insufficient. For the General Electric Project, plaintiff alleges only "threats of permit delay," not what threats were made or whether or not they had merit. For the Gotaverken project, plaintiff alleges that a union threatened environmental objections, again with no faction description of the threat, the objection or its merit or lack thereof. The GWF project contains no reference to any acts of public participation at all. Finally, for Chevron, plaintiff only refers to "environmental impact objections as well as other permit objections" without any further factual descriptions or explanations.

There is simply nothing remotely improper about filing environmental or other objections. Without something more, plaintiff fails to satisfy the Franchise Realty rule, and the continued vitality of this lawsuit would unjustifiably intrude upon defendants' rights to participate in public proceedings.

Accordingly, because plaintiff has failed to state a claim under § 2 of the Sherman Act for the above three reasons, those claims must be, and are HEREBY DISMISSED.

DISMISSAL MUST BE WITH PREJUDICE

For the following reasons, plaintiff's claims are DISMISSED WITH PREJUDICE: multiple amendments have already been attempted; the Court's specific admonitions to the plaintiff have not been heeded; and the potential chilling effect on the right to petition guaranteed by the first amendment.

First, if this Court were to allow plaintiff leave to amend, plaintiff's next attempt would be its fourth. *See Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) (district court has broad discretion to grant or deny leave to amend, particularly where the court has already given a plaintiff one or more opportunities to amend). *See also Fidelity Financial. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1438 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) (the district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend its complaint).

Moreover, the plaintiff has been unable to cure its defective pleadings in spite of this Court's specific instructions, making dismissal with prejudice proper. *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160-61 (9th Cir. 1989) (where a district court has issued an order explaining in detail the bases for its dismissal and directed the plaintiff as to how to properly allege a claim, a second amended complaint that still fails to state a claim is properly dismissed with prejudice); *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1155 (N.D. Cal. 1983), aff'd, 732 F.2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984) (dismissal with prejudice proper because plaintiffs had been put on notice by the court of pleading requirements and failed to cure defects). Plaintiff's failure to cure these defects despite this Court's direction leaves the Court highly skeptical of plaintiff's ability to allege the facts necessary to state a viable claim.

Finally, the parties have disputed whether or not this suit may fairly be characterized as a SLAPP suit. Irrespective of whether that label fits, the Court is mindful that the pendency of this suit, both in litigation costs and threats of treble damages, could have the effect of chilling the defendants' rights to public participation. As such, and in view of the ample opportunities afforded plaintiff to state a cognizable claim, dismissal with prejudice is warranted. *Franchise Realty*, 542 F.2d at 1085-86 (denying leave to file a second amended complaint alleging antitrust violations from unions' participation in permit proceedings); *Barger*, 564 F. Supp. at 1155 ("in view of the burden on defendant's exercise of its First Amendment rights which would be imposed by unnecessarily prolonging this litigation, the complaint is dismissed with

prejudice. . . . ").[17] Accordingly, the above-captioned matter is HEREBY DISMISSED WITH PREJUDICE.

CONCLUSION

For the above stated reasons, defendants' motion to dismiss is GRANTED and the complaint is accordingly DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED: March 19, 1992.

EUGENE F. LYNCH
United States District Judge

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[17] The Court also notes that in oral argument, plaintiff did not seek leave to amend, but rather chose to stand on its current complaint. Plaintiff did so fully aware of the Court's indication in oral argument that this case ought to be dismissed and an appeal taken, if necessary.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETROCHEM INSULATION, INC., Plaintiff, v. NORTHERN CALIFORNIA AND NORTHERN NEVADA PIPE TRADES COUNCIL, District Counsel 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; LOCAL UNIONS 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, AND 662; THOMAS R. ADAMS; THOMAS R. ADAMS, P.C.; ADAMS & BROADWELL, P.C.; and THOMAS J. HUNTER, Defendants

No. C-90-3628 EFL

April 30, 1991, Decided
April 30, 1991, Filed

JUDGES:

Eugene F. Lynch, United States District Judge.

OPINION BY: LYNCH

OPINION: ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

I. SUMMARY

This action is brought by Petrochem Insulation, Inc., an open shop subcontractor, against multiple defendants comprised of union organizations, local union chapters, and their attorneys. The complaint asserts that the defendants have conspired to threaten and have threatened to

petition at public permit hearings to coerce various developers to enter into agreements to employ union-only labor. Such agreements, termed "hot cargo" agreements, violate section 8(e) of the National Labor Relations Act, 29 U.S.C. section 158(e).[1] This practice, the complaint asserts, constitutes criminal extortion under California law and the federal Hobbs Act. The criminal extortion, in turn, allegedly constitutes the predicate act for the criminal liability of defendant under the Racketeering Influence and Corrupt Organizations Act (hereinafter "RICO"). Defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This Court has proper jurisdiction pursuant to 28 U.S.C. § 1331.

The defendants' motion to dismiss presents several questions, but the Court's disposition of the case requires it to reach but one: whether plaintiff's RICO claims are preempted by the NLRA because the predicate act alleged, criminal extortion, is founded upon a violation of the National Labor Relations Act properly under the jurisdiction of the National Labor Relations Board

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[1] Section 8(e) provides, in pertinent part: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

(NLRB). This Court finds preemption is proper. Accordingly, plaintiff's complaint is dismissed without prejudice.

II. STATEMENT OF THE FACTS

The complaint avers the following: plaintiff is a non-union insulation prime contractor and sub contractor. One of plaintiff's major markets is the installation of insulation in cogeneration and alternative fuel power plants. The construction of such plants requires numerous permits and licenses from land use and environmental permitting agencies. Plaintiff alleges that significant delays in the permitting proces[s] can reduce or destroy the economic viability of such construction projects. Since 1988, plaintiff contends that Tom Adams has worked in conjunction with Thomas Hunter and District Council 51 to increase the unions share in the construction market by extorting developers. In particular, plaintiff alleges that the defendants have threatened to petition and to object at permit proceedings, without regard to the merit of their objections, in order to coerce developers into entering into hot cargo agreements.[2] These agreements require a developer to use only construction contractors and subcontractors who have collective

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[2] Plaintiff claims that the defendants threatened to make objections "without regard to merit," but does not provide factual support. Indeed, the plaintiff does not identify the substance of the threatened objections anywhere in the complaint. Because it is not necessary to determine their merit in order to adjudicate the motion to dismiss, the Court shall assume without deciding that the objections were without merit.

bargaining agreements with union organizations. In addition, to coercing a specific developer, one goal of defendants' activities was to make the developer an "object lesson" to other developers, thereby influencing them to hire union labor.

The complaint does not allege that the plaintiff itself was ever extorted or threatened. Rather, the plaintiff opines that, as a non-union subcontractor, it has lost work opportunities, and attendant profits, as a result of "extortionate" tactics of the defendants.[3]

Specifically, the complaint indicates four matters whose repercussions affected the plaintiff. First, plaintiff was foreclosed from bidding on a biomasss cogeneration project in Woodland, California, because defendant Local 447 induced the project's prime contractor to agree to

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[3] The group of defendants named is comprised of union organizations, local union chapters, and their attorneys. Specifically, the complaint avers that defendant District Council 51 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is an unincorporated labor association whose members are local unions; defendant Thomas J. Hunter is the business manager of District Council 51; defendant United Association of journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO is the union organization that chartered District Council Number 51; defendant Local Unions 62, 159, 228, 246, 342, 343, 350, 365, 393, 437, 444, 447, 460, 467, 471, 483, 492, 503, and 662 are all local unions located in either California or Nevada; defendant Thomas R. Adams is a lawyer, associated with defendants Thomas R. Adams, P.C. and defendant Adams & Broadwell, P.C., who has worked with District Council 51.

employ only union contractors by threatening to file environmental objections unless he did so. Second, plaintiff alleges that it lost the opportunity to bid upon the five cogeneration plants to be built by GWF Power Systems Company. Although the developer, M.W. Kellog Company, initially requested plaintiff to submit a bid for subcontract work, the energy producer, GWF Powers Systems Company, later informed them that the project was a union-only contract and therefore Petrochem was precluded from bidding unless it employed union labor. Without specifying the causal relationship, plaintiff alleges that this change of heart occurred due to defendants' extortionate threats. Third, plaintiff avers that the defendants' "unlawful acts" and "conspiracy" required the General Electric Company to boycott open-shop contractors when awarding contracts for the Burney Cogeneration Plant construction project, thereby preventing plaintiff from receiving a contract. Fourth, plaintiff alleges that it failed to obtain a chance to bid for a Chevron project as a result of threats by defendant Adams to file environmental impact objections unless Chevron agreed to use union contractors.

Plaintiff's complaint denominates three causes of action all arising under RICO. The first cause of action is for violation of 18 U.S.C. section 1962(c), which prohibits participation through a pattern of racketeering activity in the affairs of an enterprise engaged in interstate commerce.[4] The second cause of action is for violation of 18

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[4] 18 U.S.C. section 1962(c) provides, in pertinent part, "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or

U.S.C. section 1962(a), which makes it unlawful for any person who has received income derived from racketeering activity to use it in an enterprise engaged in interstate commerce.[5] The third cause of action is for a conspiracy to violate the sections cited above, itself a violation of 18 U.S.C. section 1962(d).[6]

All three of plaintiff's causes of action rely upon criminal extortion as the predicate act of racketeering bringing defendant's activity within the proscription of the RICO Act. Plaintiff's theory of extortion is that the defendants' tactics were wrongful because their objective was to gain property, hot cargo agreements, to which they were not rightfully entitled because they violate the NLRA.

III. DISCUSSION

A. The Standards For Dismissal under Fed. R. Civ. P. 12(b)(6)

A motion to dismiss for failure to state a claim may only be granted if it appears to a certainty that the

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indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[5] 18 U.S.C. section 1961((a) provides, in pertinent part, "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in . . . establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[6] 18 U.S.C. section 1962(d) provides that "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

plaintiff would be entitled to no relief under any state of facts that could be proved. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). On a motion to dismiss, a court presumes the facts alleged in the complaint to be true. *Halet v. Wend Invest. Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982). In addition, a court must draw every reasonable inference from the complaint's allegations in the plaintiff's favor. *Retail Clerks International Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Thus, a court may reasonably infer a fact from the facts properly alleged. *See id.*; *see* also *Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963). Although a court is bound to give deference to plaintiff's allegations, it is improper for a court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

B. Even Assuming that Defendants' Acts Constitute the RICO Predicate Act of Criminal Extortion, the Claim of Extortion is Wholly Dependant Upon an Unfair Labor Practice and is Therefore Preempted by the NLRA.

1. Overview of the Elements of Criminal Extortion

To bring its action within the purview of RICO, plaintiff must sufficiently allege the requisite "pattern of racketeering activity." 18 U.S.C. section 1961 lists the acts, known as 'predicate acts' encompassed by the definition of 'racketeering activity." One such predicate act, as

defined in 18 U.S.C. section 1961, is extortion under state law or extortion or attempted extortion under the Hobbs Act, 18 U.S.C. § 1951.[7]

"Extortion" is defined by the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear." 18 U.S.C. section 1951(b)(2). The definition is substantially the same under California law. The courts have developed a substantial body of case law construing the operation of this definition. In particular, courts have focused upon the interrelation of the "means," here the "use of . . . fear," the "ends," the obtaining of "property," and the over-arching modifier of both, "wrongful."

With respect to the "means," plaintiffs allege that defendants threatened to lodge objections at public permit hearings, without regard to merit, in order to cause the developers concern that the proceedings would be slowed, approval delayed, and as a consequence, their projects' profitability would be diminished. It is well-settled that fear of economic loss, not only fear of physical harm, is encompassed by the *Hobbs Act. United States v. Cusmano*, 659 F.2d 714, 715 (6th Cir. 1980), cert. denied, 467 U.S. 1252 (1984); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert denied, 450 U.S. 916 (1981); cf.

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[7] 18 U.S.C. section 1961 provides, in pertinent part, " 'racketeering activity' means . . . any act or threat involving . . . extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year; [and] any act which is indictable under . . . title 18, United States Code . . . section 1591. . . . "

United States v. Gates, 616 F.2d 1103, 1106 (9th Cir. 1980) (inducing payments to avoid county business tax).

With respect to the "ends," courts have broadly construed the property element of extortion under the Hobbs Act as including tangible as well as intangible property rights. The concept of property includes the property right to make business decisions free from wrongful coercion. *See* e.g. *United States v. Zemek*, 634 F.2d at 1174; *see United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979) (right to make business decisions free from outside pressure wrongfully imposed); cf. *Battaglia v. United States*, 383 F.2d 303 (9th Cir. 1967), cert. denied, 390 U.S. 907 (1968) (right to lease space in bowling alley free from threats).

Finally, the meaning of "wrongful" under the Act has engendered judicial debate. In *United States v. Enmons*, 410 U.S. 396, 400 (1973), the Supreme Court attempted to provide guidance. The Court observed that on the face of the Hobbs Act, "wrongful" modifies each of the enumerated means of obtaining property, i.e., actual or threatened force, violence or fear. *Id.* at 396. Congressman Hobbs, the sponsor of the legislation, himself indicated that "wrongful" was to modify the entire section. *Id.* at 399, fn. 2. However, the Court reasoned that "wrongful" must also be read as limiting the statute's coverage to instances where the extortionist's obtaining of property was wrongful because he lacked a lawful claim to it: "The term 'wrongful' . . . would be superfluous if it only served to describe the means used. For it would be redundant to speak of 'wrongful violence' or 'wrongful force' since . . . any violence or force to obtain property is 'wrongful.' Rather, 'wrongful' has meaning in the Act

only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* at 400.[8]

Plaintiff's entire theory of criminal extortion is founded upon the proposition that defendants' threats to petition, which are asserted to have induced economic fear, were "wrongful" solely because the defendants sought thereby to obtain property, hot cargo agreements, to which they were not legally entitled because such agreements violate the NLRA. In its long complaint, plaintiff indicated only generally the property wrongfully obtained, as "tangible and intangible property rights, including the right to make business decisions free from wrongful coercion." However, in its memorandum in opposition to the motion to dismiss, and at hearing, plaintiff indicated more narrowly that the property allegedly extorted was hot cargo agreements. Indeed, its whole theory of extortion rested upon this premise. In its memorandum, plaintiff explained its theory in light of Enmons' holding that the obtaining of property is "wrongful" because the alleged extortionate does not have a lawful claim to it: "Because the subject property,

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[8] The Supreme Court's analysis indicated that "wrongful" does not only serve to modify the means, but also to modify the end, the taking of property to which the extortionist has no lawful claim. Certain progeny of Enmons have interpreted the case to mean that "extortion" requires the employment of an unlawful means to pursue an unlawful end. *See* e.g. *Hall American Center Associates Ltd. Partnership v. Dick*, 726 F. Supp. 1083, 1095 (E.D. Mich. 1989); U.S. v. Traitz, 871 F.2d 368, 381 (3rd Cir. 1989).

the "hot cargo" agreement, is not a lawful claim, Enmons cannot provide the defendants with immunization from charges of extortion."[9] At hearing, plaintiff strenuously argued that defendants' threat to petition was "wrongful" only because they sought to trade the right to petition for "illegal" hot cargo agreements. Because plaintiff has represented to the Court that the illegal agreements are the "property" subject to extortion, and indeed rested its whole argument upon that premise, the Court exercises its discretion to view that representation as a judicial admission of fact. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988) (statements of fact contained in a brief may be considered admissions of the party in discretion of the district court).

Under plaintiff's theory, in sum, criminal extortion is the predicate act for the RICO cause of action. The claim of criminal extortion, in turn, is wholly dependant for its "wrongfulness" on the notion that its objective was an illegal property, a hot cargo agreement forbidden by the NLRA. In short, defendants' underlying conduct is extortionate and wrongful only by virtue of the labor laws. Because plaintiff's RICO claim is thus based upon an unfair labor practice, it is preempted by the NLRA.

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[9] In addition, plaintiff's opposition described the extortionate act as trading environmental objections for an unlawful promise from an owner to cease doing business with other employers, i.e., for a "hot cargo" agreement.

2. Preemption of RICO Claims by the NLRA.

Congress carefully crafted federal labor laws and created agencies to administer them in order to strike a delicate balance between the forces of labor and management. Congress originally gave the National Labor Relations Board exclusive jurisdiction over unfair labor practices as set forth in the National Labor Relations Act. 29 U.S.C. section 160(a). *Butchers' Union, Local No. 498, etc. v. SDC Invest., Inc.*, 631 F. Supp. 1001, 1006 (E.D. Cal. 1986). However, Congress later created exceptions to the NLRB's exclusive jurisdiction, permitting certain unfair labor practices to form the basis of causes of actions in federal court. 29 U.S.C. section 187(b); Butcher's Union, 631 F. Supp. at 1006, citing *Constar INc. v. Plumbers Local 447*, 568 F. Supp. 1440 (E.D. Cal. 1983), aff'd 748 F.2d 520 (9th Cir. 1984); also citing *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 241-42 (1952). Therefore, although the general rule known as the preemption doctrine is that NLRB jurisdiction preempts the jurisdiction of federal courts, *Amalgamated Asso. of Street, etc. v. Lockridge*, 403 U.S. 274, 276 (1971), the preemption doctrine does not apply if it is unfair to infer that Congress intended the NLRB to have exclusive jurisdiction over the matter. *Vaca v. Sipes*, 386 U.S. 171, 179 (1967)

Butchers' Union, Local No. 498 is the leading case on the issue of whether a RICO claim predicated upon violations of the federal labor laws is preempted by the NLRA. In a learned and thoughtful opinion, Chief Judge Karlton addressed the issue of whether Congress, in enacting the RICO statute, intended to create an exception to the

NLRB's preemptive jurisdiction over actions arising under the NLRA. There, the plaintiff, a union, brought a RICO action against an employer. The plaintiff alleged three different acts as the requisite predicate acts for RICO liability: First, a violation of the Labor Management Relations Act's ban on "sweetheart contracts," under 29 U.S.C. section 186; Second, mail fraud under 18 U.S.C. section 1341; and third, wire fraud, under 18 U.S.C. section 1343. The first predicate act was one directly proscribed by the labor laws. The latter two, mail and wire fraud, were generic predicate acts not necessarily related to the labor law. However, in the case of Butcher's Union, the acts underlying the fraud claims were argued to constitute fraud wholly because the underlying acts were unfair labor practices. In short, the claims of fraud rested wholly upon violations of labor law.

The court first examined the predicate act founded upon "sweetheart" contracts in violation of section 186. It concluded that Congress had expressed its intent to except RICO claims based on section 186 violations from preemption by the NLRA because Congress had specifically included a violation of that labor law statute as a predicate act under RICO. 18 U.S.C. section 1961(1). Moreover, noted the Court, section 186 was the only labor law whose violation Congress had specifically enumerated as a predicate act for RICO liability. "The inclusion of section 186 violations as predicate acts suggests that Congress was being selective as to what activities were being removed from the ambit of the exclusive jurisdiction of the labor law." *Id.* at 1009. Because of its inference that Congress intended to be selective when removing labor law violations from the preemptive jurisdiction of

the NLRB, the court reasoned that "the violation of no other labor statute constitutes a RICO predicate act." *Id.* at 1009.

In accord with this logic, the Butchers' Union court held that where RICO liability is predicated upon violation of a generic, non-labor statute, such as mail fraud, and the violation of that statute is predicated upon an unfair labor practice which otherwise falls within the NLRA, the RICO claims are preempted by the NLRA. The Court acknowledged that there was little legislative history addressing preemption where the acts complained of constituted predicate acts on the grounds that they violated a generic statute, such as mail fraud, and at the same time constituted unfair labor practices subject to the NLRB's exclusive jurisdiction. Lacking the guidance of legislative history or Congressional intent, the Court relied upon the accepted holdings of labor law preemption. *Id.* at 1010, citing *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497, 504 (9th Cir. 1985) (accepted principles of labor law preemption should govern where statutory or congressional guidance lacking). The court, relying on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), observed that a claim is generally preempted if it is arguably within the NLRB's jurisdiction. In Butchers' Union, the plaintiff relied upon mail fraud and wire fraud as requisite predicate acts for RICO liability. However, plaintiff's complaint alleged that the use of the mails and the wires perpetrated a fraud only because it deprived plaintiff's rights under the labor laws. Because liability for the predicate acts of mail and wire fraud statutes was

"wholly dependant on the labor laws," the court held that RICO claims were preempted by the NLRA. *Id.* at 1011.[10]

Subsequent federal cases have applied the Butchers' Union test for preemption. Each has found that if the RICO predicate acts were based on generic statutes, such as mail and wire fraud, and, in turn, the conduct underlying the predicate acts was wrongful only by virtue of the labor laws, the RICO claim was preempted by the NLRA. *Brown v. Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1224-26 (N.D. Ill. 1988) (NLRA preempts RICO claims where conduct underlying generic RICO predicate acts also constitutes an unfair labor practice under NLRA). *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 371 (S.D. Ill. 1990) (where predicate acts of mail fraud, wire fraud and extortion are all based solely upon violation of labor laws, RICO claims are preempted by NLRA). *See* also *MHC, Inc. v. International Union, United Mine Workers*, 685 F. Supp. 1370, 1374-80 (E.D. Ky. 1988) (RICO claim based on predicate act of mail fraud, involving alleged violation of NLRA, was preempted).

The facts of the instant case bring it within the purview of the Butchers' Union analysis and, accordingly, lead to the same result of preemption. The complaint asserts that criminal extortion pursuant to the Hobbs Act and California law constitutes the predicate act for its RICO claim. However, the claim of criminal extortion is wholly dependent upon a violation of the NLRA. Plaintiff's theory is that defendants' use of fear of economic

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[10] The Court's reading of Butcher's Union makes obvious its view that plaintiff's reading of the case is, in actuality, a radical misreading which vainly attempts to patch together a back-stop argument out of quotations taken out of context.

harm was extortionate because they sought to obtain property, an agreement, to which they were not lawfully entitled only because the agreement violated Section 8(e) of the NLRA. In short, defendants' liability for criminal extortion is wholly dependent on a violation [of] the labor laws. Accordingly, because the only predicate acts alleged are bottomed upon violations of the labor laws, the RICO claims are preempted by the NLRA. The Court dismisses plaintiff's complaint without prejudice.[11] IT IS SO ORDERED.

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[11] Plaintiff has not formally filed a motion for leave to file an amended complaint. However, plaintiff's papers make certain intimations that the complaint ought to be read to assert anti-trust claims. The memorandum in opposition turns for support to the "sham exception" of the Noerr-Pennington doctrine in anti-trust. In a letter to the Court dated April 1, 1991, plaintiff mentions in passing that it alleges "an unlawful conspiracy" to engage in conduct "prohibited by the anti-trust laws." Such is a revelation to one who reads the complaint. It contains no causes of action based upon the anti-trust laws and makes no mention of the anti-trust laws. However, it is possible, on the facts alleged, that plaintiff may be able to allege an anti-trust cause of action and proceed upon that theory even though preemption bars its RICO claims. Accordingly, plaintiff's complaint is dismissed without prejudice. Plaintiff is granted 25 days from the date of this order to move the Court for leave to file an amended complaint for the limited purpose of pleading non-RICO claims. Because plaintiff's RICO claims are barred by preemption, plaintiff should not seek to employ amendment as a collateral attempt to replead them. If plaintiff chooses to amend, it should attach a memorandum of points and authorities and a copy of the amended complaint indicating the newly-amended or added sections.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1530 **September Term, 2000**

Petrochem Insulation, Inc.,
Petitioner,

v.

Filed On: Apr. 16, 2001

National Labor Relations Board,
Respondent

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Locals 62, 159, 228, 246, 342, 343, 350, 393, 442, 447, 467 and 483,
Intervenor

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Randolph did not participate in this matter.

29 U.S.C. § 157

U.S. Code as of: 01/05/99

Section 157. Right of employees as to organization, collective bargaining, etc.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

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29 U.S.C. § 158

U.S. Code as of: 01/05/99

Section 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to

it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and

conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly

required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

(A) forcing or requiring any employer or selfemployed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be

construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a

labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select

such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick

up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification –

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any

modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to

agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer, or "any other person" shall not include persons in the relation of

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[1] So in original. Probably should be "unenforceable".

a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in

opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. § 160

U.S. Code as of: 01/05/99

Section 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing

before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed

with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as

provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the

jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on

the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub. L. 98-620, title IV, Sec. 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon

shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court

within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or

protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BE&K CONSTRUCTION COMPANY, Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner, STEAMFITTERS LOCAL 342, et al., Intervenors.

Nos. 99-6469; 00-5012

February 1, 2001, Argued

April 9, 2001, Decided

April 9, 2001, Filed

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Heather L. MacDougall, McGUINESS, NORRIS & WILLIAMS, Washington, D.C., for Amicus Curiae.

JUDGES: Before: DAUGHTREY and GILMAN, Circuit Judges; COLLIER, District Judge.*

OPINION BY: MARTHA CRAIG DAUGHTREY

OPINION:

MARTHA CRAIG DAUGHTREY, Circuit Judge. In the midst of a contentious labor dispute, the petitioner, BE&K Construction Company, filed suit in federal court in California against numerous labor organizations. The purpose of the lawsuit was to squelch certain concerted activity in which the unions were engaging on behalf of members who were on the BE&K construction site as employees of various sub-contractors and to ensure safe working conditions on the job-site. When the district court denied the requested relief, the unions filed complaints with the National Labor Relations Board, alleging that BE&K's court filings constituted an unfair labor practice. Based on the Supreme Court's ruling in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 76 L.Ed.2d 277, 103

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* The Honorable Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

S.Ct. 2161 (1983), the Board agreed with the unions and ordered the petitioner to cease and desist from its illegal activities and, additionally, ordered the company to reimburse the unions for their attorneys' fees and costs. From that decision, the petitioner seeks review, contending (1) that the opinion in *Bill Johnson's* does not apply to non-employee unions; (2) that the district court suit in California did not constitute an unfair labor practice because it did not completely lack a reasonable basis; (3) that there was not substantial evidence to support the Board's ruling that the California litigation was retaliatory; and (4) that the Board was not justified in awarding costs and fees against the petitioner. Also before this court is the Board's related petition for enforcement of its order. For the reasons detailed in this opinion, we conclude that BE&K's petition for review should be denied and the Board's petition for enforcement granted.

FACTUAL AND PROCEDURAL BACKGROUND

In late 1986 or early 1987, BE&K, an industrial general contractor operating throughout the United States, contracted with USS-POSCO Industries, Inc., to modernize a steel mill in Pittsburg, California. BE&K then formed a joint venture with Eichleay Constructors, Inc., to perform the contract work. According to BE&K, various union groups objected to the BE&K agreement with USS-POSCO because BE&K maintained no collective bargaining relationship or agreement with the unions. BE&K contends that in retaliation for USS-POSCO awarding the modernization contract to a non-union contractor, the unions engaged in various activities to delay the project. Specifically, BE&K maintains that the unions: advocated

the adoption and enforcement of a toxic waste emission standard for the construction project, even though the labor groups had no genuine concern that the modernization of the steel mill would be environmentally harmful; picketed and hand-billed at BE&K's premises without disclosing the nature of their disagreement with the company and encouraged employees of subcontractors to engage in a strike at the project; filed a civil action in California state court, *Piledrivers, Divers, Bridge Wharf & Dock Builders Union Local 34, AFL-CIO, et al. v. USS-POSCO Indus., Inc., et al.*, 692 F.Supp. 1166, alleging, among other things, violations of California's Health and Safety Code in an effort to delay the modernization project and increase costs; and initiated contract grievances against Eichleay Constructors, BE&K's joint venturer, under collective bargaining agreements that did not apply to Eichleay.

In response to what BE&K pejoratively terms the unions' "corporate campaign," USS-POSCO and BE&K filed suit in district court in California against numerous labor organizations pursuant to § 303 of the National Labor Relations Act, 29 U.S.C. § 187, seeking damages for the allegedly unfair tactics. The union defendants filed motions for summary judgment with the court, arguing that "the activities challenged in the first and third claims (legislative lobbying and filing lawsuits, respectively) are protected by the First Amendment," and that "because contractual grievance and arbitration proceedings are the preferred method of resolving labor disputes under federal labor policy," the fourth claim regarding initiation of grievance proceedings cannot result in labor law liability. *See USS-POSCO Indus. v. Contra Costa County Bldg. &*

Constr. Trades Council, AFL-CIO, 692 F.Supp. 1166, 1168 (N.D. Cal. 1988).

Relying upon the rationale adopted by the United States Supreme Court in *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 76 L.Ed.2d 277, 103 S.Ct. 2161 (1983), the district court granted summary judgment to the union defendants on the companies' legislative lobbying claim (Claim 1). As noted by the district court:

> The lobbying of state and local legislative bodies implicates the same First Amendment and federalism concerns at issue in *Bill Johnson's Restaurants.* The right to petition a legislative body falls squarely under the "umbrella of 'political expression'." As for federalism concerns, this Court will not lightly infer a Congressional intent to "ignore the substantial state interest in protecting the health and well-being of its citizens." Such an interest is clearly at stake when a toxic waste law is under consideration by a local legislative body.

USS-POSCO Indus., 692 F.Supp. at 1169-70 (citations omitted).

Summary judgment was also granted to the defendants on Claim 4 (initiating collective bargaining grievances). In so ruling, the district court relied upon the fact that even USS-POSCO's and BE&K's own exhibits indicated that the challenged grievances had been successful and, "as with well-founded state lawsuits, successful grievances to enforce lawful provisions of a collective bargaining agreement cannot constitute unfair labor practices. . . . " *Id.* at 1170.

Finally, summary judgment was denied, without prejudice, on the claim that the unions improperly filed a state court action against the companies. In making that ruling, the district judge noted that, while the right of access to the courts is a protected First Amendment right, a baseless state suit receives no such protection. The court thus allowed the parties additional time for discovery in order to ascertain whether the unions' state court lawsuit was indeed baseless. *See id.* at 1170.

Subsequently, after the dismissal of two of USS-POSCO's and BE&K's claims against the defendant unions, USS-POSCO and BE&K filed an amended complaint that not only included some claims similar to those upon which the court had previously granted summary judgment, but also a claim that alleged, for the first time, violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In response to dispositive motions filed by the union defendants, the district court dismissed the amended complaint as "unacceptable because the first cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted by the Court." The court did grant USS-POSCO and BE&K leave to revise the amended complaint, however, so as to bring the filing in line with existing court rulings.

In that same order, the district court also dismissed USS-POSCO's and BE&K's unfair labor practice claim that was based upon the unions' prosecution of a state court action seeking redress for alleged safety violations at company sites. First, the court dismissed that part of the claim that sought imposition of liability upon two union locals, Steamfitters Local 342, United Association

of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and Local 302 of the International Brotherhood of Electrical Workers, AFL-CIO, because those organizations were not parties to the state court litigation. Second, the court dismissed the claim against the remaining union defendants who had been parties to the state action because the federal court concluded that the companies failed to demonstrate that the state claims had been without a reasonable basis in law. In fact, although noting that the unions had failed in the state proceeding to obtain either a temporary restraining order or a preliminary injunction against the companies, the district court recognized that, as a result of the court filing by the unions, federal investigators from the Occupational Safety and Health Administration found "numerous health and safety violations" at the job-site. Consequently, the companies were unable to cite to any evidence "which could support a finding that no reasonable legal and factual basis existed for the filing of the state court action."

Eventually, USS-POSCO and BE&K filed a second amended complaint with the district court. In that document, the companies reasserted many of the same claims they had previously advanced, specifically the allegations of antitrust violations; improper picketing, lobbying, and hand-billing; and improper filing of grievances and court actions. The district court dismissed the complaint insofar as it raised allegations already addressed in prior rulings. Further, because USS-POSCO and BE&K continued to raise such issues, the court imposed sanctions upon the plaintiffs pursuant to Rule 11 of the Federal Rules of Civil Procedure. USS-POSCO then dismissed, with prejudice,

its other claims against the unions; as a result, the remaining issues went forward through the discovery process with only BE&K as a party plaintiff.

By court order, however, the district court limited the scope of BE&K's discovery requests. Because the court concluded that the company, in order to succeed on its antitrust claims, must prove both that the unions improperly combined with non-labor groups and that the combination had occurred for an illegitimate purpose, the district judge first ordered that discovery be limited to the issue of whether BE&K could establish that the unions actually combined with non-labor entities. *See USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 804 (9th Cir. 1994). Because the company could not adduce any evidence in support of that prong of the court-defined analysis, the district judge granted the unions' motion for summary judgment on the antitrust cause of action. At that point in the proceedings, BE&K voluntarily dismissed the remaining allegations of labor law violations, which asserted that the unions had illegally fomented violence against the company. Following entry of final judgment, BE&K appealed to the United States Court of Appeals for the Ninth Circuit, contending that the district court had erred in its explication of antitrust law and in its imposition of sanctions pursuant to Rule 11.

The Ninth Circuit agreed with BE&K that the district court erred in concluding that an adversary must establish both that a union combined with a non-labor group and that the union did not act in its legitimate self-

interest before the labor organization's statutory exemption from antitrust liability could be circumvented. Nevertheless, the court found that any error in the district court's analysis was harmless because application of the Noerr-Pennington doctrine also provided antitrust immunity to the unions while lobbying government officials or while petitioning administrative agencies or courts, unless the party was engaged in "sham" petitioning. *See id.* at 810.[1] Despite BE&K's arguments to the contrary, the court refused to conclude that the unions' lawsuits were frivolous and brought without regard to the merits. As noted in the court's opinion:

> Here, . . . fifteen of the twenty-nine lawsuits alleged by BE&K as part of the pattern of filings "without regard to the merits" have proven successful. The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success.

Id. at 811 (footnote omitted). Consequently, the court affirmed the district court's dismissal of the antitrust claims against the unions; however, the appellate tribunal also reversed the lower court's award of Rule 11 sanctions on the ground that the company re-pleaded previously-dismissed claims in its amended complaint only

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[1] *Noerr-Pennington* immunity principles are derived from the holdings of the United States Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L.Ed.2d 464, 81 S.Ct. 523 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L.Ed.2d 626, 85 S.Ct. 1585 (1965).

out of a legitimate, although incorrect, belief that such reallegation was necessary to preserve the issues for future appeal. *Id.* at 811-12.

During the pendency of these various court proceedings, the NLRB had held in abeyance unfair labor practice complaints originally lodged by two union locals (and joined by numerous other labor organizations) shortly after USS-POSCO and BE&K filed suit against them in California district court. With the conclusion of that litigation, the NLRB reasserted jurisdiction over the administrative complaints and determined that the companies had indeed attempted to retaliate against the unions and their members for engaging in activities protected by federal labor legislation by filing the meritless lawsuit. The Board thus ordered BE&K to cease and desist from such illegal actions and directed the company to pay the legal fees and expenses incurred by the union defendants in the USS-POSCO litigation. From that Board decision, BE&K now petitions to this court for review. The Board has also availed itself of the jurisdiction of this court, seeking enforcement of the Board's order.

DISCUSSION

I. Ability of Non-Employee Union to Seek Relief Under Federal Labor Law

Pursuant to the provisions of § 7 of the National Labor Relations Act:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

> bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . .

29 U.S.C. § 157. Moreover, § 8(a)(1) of that same act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . . " (Emphasis added.)

The Board concluded in this case that BE&K's filing of a federal court action against the union defendants amounted to just such an unfair labor practice under § 8(a)(1) of the Act. BE&K, of course, disagrees and first asserts that it is interference only with employees, and not with unions, that is prohibited by the Act. Both the company and the unions do agree, however, that the starting point for any analysis of this issue is the seminal decision of the United States Supreme Court in *Bill Johnson's*.

In that case, the Court noted potential First Amendment implications if the Board sanctioned an employer for exercising its right to petition the courts for a redress of grievances. *See Bill Johnson's*, 461 U.S. at 741. Where the lawsuit initiated by the employer lacks a reasonable basis in fact or law, however, and where the action was filed to retaliate against the employee or employees for engaging in activity protected by federal labor legislation, the First Amendment concerns are ameliorated and the Board may actually enjoin the prosecution of the case. The Court went on to hold that, in situations in which the employer

has already availed itself of the protections of the court system and a judgment adverse to the plaintiff has been rendered, there is no need to meet the heightened burden required to be satisfied when an employee seeks to enjoin an ongoing judicial proceeding. In fact, the governmental interest in ensuring a forum for redress of wrongs has been fulfilled in such instances and Board action is justified upon a showing only of an unmeritorious, rather than "baseless," lawsuit filed for a retaliatory purpose. *See id.* at 749.

Indisputably, the explicit language of *Bill Johnson's* refers only to the potential improprieties of employer-initiated lawsuits filed against employees engaged in protected activities. However, *Bill Johnson's* language regarding such suits was restricted to those circumstances, and not to suits filed against unions, simply because the Court appropriately addressed only the case then before it. *See Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1377 (7th Cir. 1997).

Nevertheless, BE&K contends that subsequent Supreme Court pronouncements took that next analytical step that was not appropriate in *Bill Johnson's*. Specifically, the company notes that the Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532, 117 L.Ed.2d 79, 112 S.Ct. 841 (1992), explained that, "by its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." Again, however, an understanding of the nature of the dispute that precipitated the *Lechmere* decision places the Court's seemingly all-inclusive statement in a more restrictive context. In *Lechmere*, the Supreme Court was asked to resolve a dispute concerning the asserted rights of an

organizing union to enter upon private property to distribute handbills to company employees to whom the union had alternative means of access. Although ruling that unions had no right under the Act to trespass upon private property under the circumstances presented in that case, the Court also recognized that § 7 of the Act, by necessary implication, extended some legislative protection to unions.[2] Citing its earlier decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 100 L.Ed. 975, 76 S.Ct. 679 (1956), the Court stated "that insofar as the employees' 'right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,' § 7 of the NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property." *Lechmere*, 502 U.S. at 532.

BE&K insists that the "core" right of self-organization is not implicated in this matter and that the non-

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[2] Similarly, the Sixth Circuit decision in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237 (6th Cir. 1995), upon which BE&K also relies, involved only a situation in which nonemployee union members trespassed onto private property in order to distribute handbills to Johnson & Hardin employees. As a result, that case also stands for the proposition that nonemployee organizers may enter onto private property only under extremely limited circumstances. The case does not, however, stand for the broader legal principle that unions have no § 7 rights whatsoever. *See* also *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 463 (6th Cir. 1996) (recognizing that "there is a substantial difference between the rights of employees and of nonemployees with respect to the distribution of union literature on privately owned property), overruled on other grounds in *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 (6th Cir. 1997).

employee union defendants are thus not entitled to the protections of § 7. Without question, courts have constructed a hierarchy of labor rights, at the highest levels of which is the effort by employees to organize for their collective good. Furthermore, because of the importance of that concerted activity, courts have accorded to organizing unions a "derivative right" to engage in such actions. *See NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994). In fact, as the Seventh Circuit has explained, "it would be anomalous to hold that an employer may not interfere with its employees' right to organize by filing baseless lawsuits against them, but that it may achieve the same result by filing a baseless lawsuit against a union attempting to organize the employees." *Geske*, 103 F.3d at 1377.

Although the activities in which the union defendants in the USS-POSCO litigation engaged did not involve overt attempts at organization, some accommodation of those actions by an employer may still be required under applicable labor law. *See*, e.g., *O'Neil's Markets v. United Food and Commercial Workers' Union, Meatcutters Local 88*, 95 F.3d 733, 737 (8th Cir. 1996) ("although area standards hand-billers are not engaging in 'core' organizing activities and therefore may deserve fewer accommodations, private property owners may, under certain circumstances, be obligated to accommodate them"). Indeed, such an obligation may be imposed even though the members of the union are not even employees of the targeted company.

The term "employee," as used in the National Labor Relations Act, is accorded a broad meaning indeed. Pursuant to the express provisions of 29 U.S.C. § 152(3), the

term "employee" (who may, under § 7 of the Act, engage in activities for "mutual aid and protection") "shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." The Supreme Court, in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564, 57 L.Ed.2d 428, 98 S.Ct. 2505 (1978), has explained that "this definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." Moreover, the statutorily-protected "employees" may seek improvement of employment terms and conditions through channels outside the immediate employer-employee relationship, including resort to administrative and judicial forums and to legislative appeals. *See id.* at 565-66. Otherwise, as explained in *Eastex*:

> To hold that activity of this nature is entirely unprotected – irrespective of location or the means employed – would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions," we do not think that Congress could have intended the protection of § 7 to be as narrow as petitioner insists.

Id. at 566-67 (citation omitted).

In this case, the lobbying and petitioning in which the unions participated was intended to protect the health of BE&K employees and improve safety conditions at company worksites, as well as to vindicate the rights of sub-contractor employees. Attainment by the unions of

even site-specific improvements or promises of diligent enforcement of existing health and safety standards, moreover, clearly establishes helpful precedent for future labor actions and serves to improve, through concerted action, the lot of all working women and men in similar situations. As such, the work of the unions in this case is not so attenuated from the interests of BE&K employees that the "activity cannot fairly be deemed to come within the 'mutual aid or protection' clause" of § 7. *Id.* at 568. Consequently, the Board decision to apply *Bill Johnson's* principles to the unions' activities in this case is proper. As held by the Board in this matter:

> It would be a curious and myopic reading of these core provisions of the Act [(§ 7's provision of the right to self-organization and of the right to engage in concerted activity for mutual aid or protection)] to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid and protection," the conduct of the unions they form and join for those purposes is not protected by the Act. Under that reasoning, conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf.
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> We note further that, in the week prior to oral argument in this matter, the United States Court of Appeals for the District of Columbia filed its decision in *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26 (D.C. Cir. 2001), a case raising many of the same issues presented here and even citing the Board's decision in the claims against BE&K. In *Petrochem Insulation*, the D.C. Circuit also concluded that unions, as well as

employees, are entitled to the protections afforded by § 7 and the principles enunciated in *Bill Johnson's*. Today, we thus join our sister circuit in that interpretation of federal labor law.

II. *Bill Johnson's* Liability

A. "Unmeritorious" v. "Lack of Reasonable Basis"

BE&K next contends that even if unions may assert derivative § 7 rights, the Board's decision that the company committed an unfair labor practice by filing suit against the unions in federal court in California is incorrect. According to BE&K, before it may be punished administratively for availing itself of the judicial process, the Board must determine that the company's suit completely lacked a reasonable basis. The explicit language of controlling Supreme Court precedent does not, however, impose such a burden upon the administrative agency.

In *Bill Johnson's*, the Supreme Court recognized that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation" because "regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it." *Bill Johnson's*, 461 U.S. at 740-41. Furthermore, "the chilling effect of a . . . lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief." *Id.* at 741. Nevertheless, the employer's right of access to the courts remains an aspect "of the First Amendment right to petition the Government for redress of grievances." *Id.*

In balancing those countervailing interests, the Court distilled certain principles that are of assistance in addressing BE&K's allegations of error in this case. First, "the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Id.* at 743. Second, the Board may enjoin "the prosecution of an improperly motivated suit lacking a reasonable basis." *Id.* at 744. Finally, and most important for purposes of this litigation:

> In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had

> wrongfully sued for their attorney's fees and other expenses.

Id. at 747.

Despite BE&K's attempts to draw fine distinctions from *Bill Johnson's*, the Board appropriately concluded in this matter that the federal district court in California had already determined that the company's claims against the unions were all either without merit or voluntarily dismissed. Because the Board's general counsel was not, therefore, attempting to enjoin a parallel proceeding, there was no need for the Board to establish that BE&K's allegations were without a reasonable basis in fact or law. Instead, because the judicial branch of government had already determined that BE&K's claims against the unions were unmeritorious or dismissed, evidence of a simple retaliatory motive would suffice to adjudge the company guilty of committing an unfair labor practice. The mere failure of company to prevail on its claims against the union in regular judicial proceedings was sufficient to strip BE&K of some of its First Amendment protection because of the company's prior opportunity to avail itself of a judicial forum for redress of its grievances. *See* also *Johnson & Hardin*, 49 F.3d at 243 ("if the employer does not prevail – the state court judgment is adverse or the suit is withdrawn or otherwise shown to be without merit – the Board may then decide whether the suit was filed with a retaliatory motive"); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 65 (2d Cir. 1992) (once the employer has lost court action on the merits "– even if he had a reasonable basis in bringing suit – the Board

may consider the filing of the suit to have been an unfair labor practice").[3]

BE&K directs this court to the Supreme Court decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 123 L.Ed.2d 611, 113 S.Ct. 1920 (1993), in support of its contention that the Court's most recent pronouncements indicate that only baseless or "sham" suits serve to restrict the otherwise unfettered right to seek court resolution of differences. That decision, however, involved only a claim of Noerr-Pennington immunity from antitrust liability. Moreover, in analogizing the situation presented in that case to the principles discussed in *Bill Johnson's*, the Court referred solely to labor law situations in which attempts were made to enjoin employer-initiated litigation, not situations in which court rulings had already been rendered. *Id.* at 59. Thus, the principles BE&K seeks to extract from *Professional Real Estate Investors* are totally inapplicable to the circumstances presently before us in this case. *See Petrochem Insulation*, 240 F.3d at 31-2.

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[3] In *Vanguard Tours*, the Second Circuit did rule that withdrawal of a suit, as opposed to a decision on the merits, should call for the higher standard of lack of a reasonable basis in fact or law before finding an unfair labor practice for filing suit in retaliation for exercise of § 7 rights. *See* 981 F.2d at 66. That case, however, did not address the situation in which the majority of a plaintiff's cause of action is dismissed on the merits and only a portion is voluntarily withdrawn. Furthermore, the court recognized that the applicable language from *Bill Johnson's* could be read for the proposition "that withdrawal of the suit is equivalent to a judgment against the employer." *Id.*

The law as interpreted by the Supreme Court in *Bill Johnson's* and by this circuit in *Johnson & Hardin* creates a bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions. Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, there is no longer a need to prevent interference with the First Amendment right to seek judicial redress. At that point, the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives.

In this case, the California district court ruled on the merits that BE&K could not succeed on its claims against the unions. Such a finding of an unmeritorious court action is thus sufficient to justify a subsequent investigation by the Board into the motives of the company in filing its lawsuit.

B. Retaliatory Motive

In arguing that the Board erred in finding that BE&K filed its suit against the unions with a retaliatory motive, the company contends that the Board inferred the requisite retaliation merely from the fact that BE&K failed on the merits of its underlying cause of action. While the Board did, in fact, mention the lack of merit of BE&K's lawsuit as one consideration in its determination of retaliatory motive, that factor was far from the only evidence

in support of the Board's finding. Indeed, if it were, the Board would run the serious risk of conflating the two elements of the *Bill Johnson's* unfair labor practice analysis and thus infringe upon the protections afforded by the petition clause of the First Amendment. Instead, the record now before us contains substantial evidence, albeit circumstantial, from which the Board could reasonably infer a retaliatory motive in BE&K's decision to file suit against the defendant unions in California district court. *See Geske & Sons*, 103 F.3d at 1375 ("motive or intent almost always must be inferred from circumstantial evidence").

First, the United States Supreme Court itself, in *Bill Johnson's*, admitted that the mere finding that an employer's suit against employees (or unions) is unmeritorious warrants the Board "taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." *Bill Johnson's*, 461 U.S. at 747. Such a judicial finding was indeed made in this instance.

Second, after much of BE&K's original suit had been dismissed by a summary judgment ruling in favor of the defendant unions, the company filed amended complaints that not only re-alleged many of the same claims upon which the district court had already ruled, but also sought treble damages from the defendants for alleged antitrust violations in banding together for protected § 7 activities. As determined by the Ninth Circuit in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1089 (9th Cir. 1995), the simple request for such punitive damages is another factor to be considered in evaluating an employer's motive in prosecuting its lawsuit.

Finally, an additional inference of retaliatory motive may be made from the fact that BE&K sought recompense from two union organizations for a previous lawsuit filed by other union officials, even though the two union locals admittedly were not parties to the precedent legal action (the *Piledrivers* suit). Even after labor attorneys called this information to BE&K's attention, moreover, the company refused to dismiss the two locals, despite BE&K's failure to uncover, after extensive discovery, any evidence of participation by those parties in the prior litigation. In response, BE&K argues that the continued prosecution of the civil action against the two locals resulted only from the business's belief that all the local unions, even those that were not parties, were "jointly responsible for a jointly devised and executed series of sham proceedings." The very disingenuousness portrayed by such an argument lends additional support to the conclusion that BE&K harbored a deep, anti-union bias that led it to retaliate against the organized labor movement for engaging in governmental petitioning and judicial proceedings protected by the federal constitution and by federal labor legislation.

The plain language of the National Labor Relations Act directs that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). Because substantial evidence in the record convincingly indicates that BE&K did indeed possess an improper, illegal, retaliatory motivation in prosecuting its suit against the union defendants, this court is duty-bound to accept that determination.

III. Propriety Of Award Of Attorneys' Fees

Having found that the defendant unions can indeed assert § 7 rights in a situation such as that presented here, and having determined that BE&K committed an unfair labor practice by filing a meritless suit against the unions with a retaliatory motivation, we must still determine whether the Board was within its power in awarding attorneys' fees to the unions to compensate them for defending against BE&K's filings. The plain language of the National Labor Relations Act and of the Supreme Court's *Bill Johnson's* decision, as well as the underlying purposes of national labor legislation, demand an affirmative response.

BE&K relies upon dicta in the Sixth Circuit's decision in *Johnson & Hardin* for the proposition that "the harsh remedy of a grant of attorneys' fees" should be invoked only to "discourage future frivolous litigation." *Johnson & Hardin*, 49 F.3d at 244. Such dicta, however, was discussed in a situation in which the employer was found not to have committed a *Bill Johnson's* unfair labor practice. Any discussion of the propriety of an attorneys' fee award in that case was thus without force or effect in future decisions. Moreover, the authorities cited by this court in *Johnson & Hardin* for the proposition now espoused by BE&K were decisions pre-dating the Supreme Court's *Bill Johnson's* ruling.

By contrast, in *Bill Johnson's* itself, the Court specifically, and without further qualification, stated that, "if a violation [of § 7 rights in a scenario like that presented in this appeal] is found, the Board may order the employer to reimburse the [parties] whom he had wrongfully sued

for their attorney's fees and other expenses. It may also order any other proper relief that would effectuate the policies of the Act." *Bill Johnson's*, 461 U.S. at 747 (emphasis added).[4] Moreover, the Court had previously explained:

> The Board's power [to fashion remedies under 29 U.S.C. § 160(c)] is a broad discretionary one, subject to limited judicial review. The relation of remedy to policy is peculiarly a matter for administrative competence. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216, 13 L.Ed.2d 233, 85 S.Ct. 398 (1964) (citations and internal punctuation omitted). *See* also *Geske & Sons*, 103 F.3d at 1378.

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[4] In fact, 29 U.S.C. § 160(c) plainly instructs:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter. . . .

(Emphasis added.)

In light of the indisputable rulings in these two Supreme Court decisions, if we were to refuse to enforce the Board's order that BE&K reimburse the unions for their attorneys' fees, we would be crossing the line demarcating not only the division of functions of the judicial and executive branches of government, but also the line dividing judicial and legislative areas of authority. The Board's order in this matter could never be construed as "a patent attempt" to frustrate the policies of the Act. In fact, the award of attorneys' fees is nothing more than an effort to correct the effects of BE&K's unfair labor practice by returning the injured parties, at least in part, to the financial positions they occupied prior to the filing of the company's unmerited, retaliatory suit. Moreover, the award replenishing union coffers serves the laudable goal of benefitting a broad range of laborers whose dues dollars initially financed the defense of the federal court action and who stand to benefit from the unions' attempts to enforce health, safety, and zoning regulations.

Furthermore, adherence to the policy advocated by BE&K to reserve attorneys' fee awards to those cases in which the non-prevailing party pursued a frivolous, as opposed to a merely unmeritorious, action evidences a basic misunderstanding of the purpose of the attorneys' fee award in this instance. As stated by the Board in its ruling:

> We do not award attorneys' fees in *Bill Johnson's* cases because employers' suits are frivolous. We award them because the suits are unlawful; they themselves constitute the unfair labor practices

> for which a remedy must be provided. As the court of appeals correctly observed in *Geske & Sons*, the Unions would not have incurred those attorneys' fees except for the Respondent's meritless lawsuit, and it is both appropriate and necessary to order that they be made whole and to provide an economic disincentive for engaging in similar unlawful conduct.

BE&K Constr. Co., 329 N.L.R.B. No. 68 at 12 (Sept. 30, 1999).

Our review of remedial action ordered by the Board is extremely limited. Because the award of attorneys' fees to the unions in this matter upon the finding of an unfair labor practice is inherently consistent with the underlying purposes of the National Labor Relations Act, any attempt to undo the administrative sanction would unnecessarily intrude upon the province of a co-equal branch of government acting within constitutional parameters.

CONCLUSION

In this case, BE&K admits that it filed a federal court action against the union defendants in an effort to coerce the unions to cease their administrative and judicial petitioning for strengthened working standards and for stricter enforcement of health and safety requirements. Because the unions, acting on behalf of affected workers, were engaged in activities protected alternatively by the federal labor laws or by the First Amendment's right to

seek redress of grievances, the Board properly determined that BE&K's effort to subvert those plans constituted an unfair labor practice. Moreover, to effectuate the policies of the National Labor Relations Act and to return the unions to the position in which they would have been without having to defend the unlawful lawsuit, the Board acted within its broad powers to order BE&K to reimburse the unions for their costs and attorneys' fees. Consequently, we must DENY BE&K's petition for review of the Board decision and GRANT the Board's request for enforcement of that ruling.

NATIONAL LABOR RELATIONS BOARD

BE & K Construction Company and Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Local 302, International Brotherhood of Electrical Workers, AFL-CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Contra Costa County Building And Construction Trades Council, AFL-CIO and Northern California District Council Of Laborers, Laborers International Union Of North America, AFL-CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO

Cases 32-CA-9474, 32-CA-9475 and 32-CA-12531-1-8

September 30, 1999

DECISION AND ORDER

By John C. Truesdale, Chairman; Sarah M. Fox, Member; Wilma B. Liebman, Member.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

On October 18, 1995, the General Counsel of the National Labor Relations Board issued a consolidated complaint alleging that the Respondent had violated Section 8(a)(1) of the Act. The Respondent filed an answer admitting in part and denying in part the complaint allegations and raising certain affirmative defenses.

On March 13, 1996, the General Counsel filed a Motion for Summary Judgment and memorandum in support, with exhibits attached. The General Counsel submits that the Respondent's answer raises no material issues of fact requiring a hearing. On March 18, 1996, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should nor be granted.[1] The Respondent filed an opposition to the motion and a cross-motion for summary judgment in its favor. The General Counsel filed a reply brief, the Charging Parties filed briefs in support of the General Counsel and in opposition to the Respondent, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] On March 21, 1996, the Board issued an amended order.

Ruling on Motions for Summary Judgment

The principal issue in this case is whether the Respondent violated Section 8(a)(1) by filing and maintaining a civil lawsuit against the Charging Party Unions in Federal district court. The General Counsel and the Unions contend that the Respondent's suit lacked merit because, except for certain claims that the court dismissed with prejudice at the Respondent's request, the court granted the Unions' motions for summary judgment in their favor. The General Counsel and the Unions further argue that the Respondent sued the Unions in retaliation for their having engaged in activities protected by Section 7 of the Act. Because the suit lacked merit and was filed for retaliatory purposes, the General Counsel and the Unions urge that, under *Bill Johnson's Restaurants v. NLRB*,[2] the Board should find that it was unlawfully filed and maintained, and should require the Respondent to reimburse the Unions for attorney's fees incurred as a result of the suit. The General Counsel and the Unions also dispute the Respondent's contention that certain allegations of the complaint are untimely.

The Respondent contends that its suit was lawful because, in its view, (1) the Unions' actions that were the subject of the suit were not protected by Section 7; (2) it prevailed in certain respects in the district court litigation; (3) the suit had a reasonable basis in fact and law; and (4) the suit was not filed with retaliatory intent. The Respondent also argues that some of the allegations of the complaint are time-barred by Section 10(b). Finally,

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[2] 461 U.S. 731 (1983).

the Respondent contends that even if it violated the Act, the Board should not require it to pay the Unions' attorneys' fees.

On the basis of the record presented, we find that there is no genuine issue as to any material fact and that the General Counsel is entitled to judgment as a matter of law. Thus, for the reasons discussed below, we agree with the General Counsel and the Unions that the Respondent's suit was unmeritorious and that it was filed in retaliation against the Unions' protected activities. We also reject the Respondent's contention that some of the complaint allegations are time barred. We therefore find that the Respondent's suit violated Section 8(a)(1) as alleged. We also find it appropriate to order the Respondent to make the Unions whole by reimbursing them for the attorney's fees they incurred in defending against the suit. In sum, we shall grant the General Counsel's motion for summary judgment and deny the Respondent's motion.

On the entire record, the Board makes the following

FINDINGS OF FACT

For the purposes of deciding the issues raised in the Motions for Summary Judgment, the factual record in this case comprises the admitted allegations of the complaint, other admissions made by the parties, and the facts actually found by the courts.[3] We make this statement

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[3] We shall also consider the affidavits and declarations attached to the parties' briefs. It is well seated that, in ruling on

because the Respondent asserts that a number of the allegations contained in its various claims were accepted as true by the courts and must be treated as facts by the Board. With that assertion we emphatically disagree.

There is no dispute that the Unions did, in fact, engage in some of the conduct – filing a state court lawsuit, instituting grievance and arbitration proceedings, and engaging in certain lobbying activities – that the Respondent argued was unlawful. The courts found those actions not to be unlawful, even if, as the Respondent contends, they were undertaken with a secondary objective. Other actions alleged to be unlawful were the subject of claims that the Respondent withdrew with prejudice; the court made no factual determinations regarding them. The Respondent nevertheless argues that the record in the court proceedings establishes that all of its factual allegations are true, including its allegations of an unlawful secondly objective.

There is no merit to that contention. The courts, in granting the Unions' motions for partial summary judgment, were required to view the record in the light most favorable to the Respondent as the nonmoving party.[4] In

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a motion for summary judgment, we are required to construe the facts in the light most favorable to the nonmoving party. Therefore, when ruling on the General Counsel's motion, we shall assume the facts as represented by the Respondent are true unless they have been determined to be otherwise by the courts. In ruling on the Respondent's motion, we shall give like treatment to the facts as represented by the General Counsel and the Unions.

[4] 10 Wright & Miller, Federal Practice and Procedure, Civil 2d, Sec. 2716

finding that the Unions were entitled to judgment as a matter of law, the courts had to assume the facts were as the Respondent alleged, not to find them so. It is plain from their decisions that the courts considered the Respondent's allegations and found that those allegations, even if true, would not support a conclusion that the Unions had acted unlawfully. The courts did not find, as facts, either that the Unions engaged in the conduct that was the subject of the withdrawn claims or that they acted from an unlawful secondary motive.[5]

I. JURISDICTION

The Respondent, BE&K Construction Company, is a Delaware corporation with headquarters in Birmingham, Alabama. It is engaged in industrial general contracting throughout the United States. During the fiscal years immediately preceding the filing of each of the charges and preceding the date of the complaint, the Respondent

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[5] The court of appeals did state that "the unions encouraged work stoppages by unionized employees because of well-founded safety concerns[.]" and "that these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE&K does not matter. *USS-POSCO Industries and BE&K Construction Co. v. Contra Costa County Building & Construction Trades Council. AFL-CIO, et al.*, 31 F.3d 800, 809 (9th Cir. 1994). Although those statements might appear to be factual findings, we doubt the court meant them as such. Elsewhere, the court referred to the Unions' alleged conduct, and it did not indicate any basis for doing otherwise in the case of the quoted material. We think the court of appeals engaged in inartful drafting rather than fact-finding in the quoted passages.

annually provided services valued in excess of $ 50,000 to customers located outside the State of Alabama. The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6); and (7) of the Act and that each of the Unions is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

USS-POSCO Industries (UPI) is a partnership formed by USX Corporation and Pohang Iron and Steel Company to modernize and operate a steel facility in Pittsburgh, California, UPI awarded a construction contract to modernize that facility to the Respondent, which is a nonunion contractor. The Respondent formed a joint venture with Eichlcay Constructors, Inc. (ECI) to perform the contract.

After the contract was awarded, the Unions allegedly began a campaign against the Respondent. According to the Respondent, that campaign was aimed at forcing UPI to enter into an unlawful prehire agreement in violation of Section 8(e), forcing UPI to cease doing business with the Respondent, and ultimately eliminating nonunion employers from the construction market in Contra Costa County and elsewhere in California.

On September 21, 1987, the Respondent and UPI filed suit under Section 303 of the Act in the U.S. District Court

for the Northern District of California.[6] The complaint alleged that the Unions

- Advocated the adoption and enforcement of a toxic waste ordinance in Contra Costa County, which would impede the progress of the modernization project, without any genuine belief that the project would harm the environment;
- Picketed and handbilled at the plaintiffs' premises without disclosing their identities or the true nature of their dispute with the plaintiffs, and induced and encouraged employees of the Respondent's subcontractors to engage in a strike at the project;
- Filed, in bad faith, a lawsuit in California state court (the Pile Drivers suit) alleging, among other things, violations of California's Health and Safety Code; and
- Initiated collective bargaining grievance proceedings against ECI under authority of collective-bargaining agreements that did not apply to ECI.

The complaint alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B).

The Unions filed motions to dismiss or for summary judgment on three of the plaintiffs' four claims. The Unions argued that lobbying for the toxic waste ordinance and filing the Pile Drivers suit were protected by the First Amendment. They also argued that because the grievance and arbitration process is the preferred method of resolving labor disputes, resort to those proceedings should not be found unlawful.

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[6] *USS-POSCO Industries and BE&K Construction Co. v. Contra Costa County Building & Construction Trades Council. AFL-CIO, et al.*, No. C-87-4829 DLJ.

On July 29, 1988, the court granted the Unions' motions in part and dismissed the allegations relating to lobbying and grievance filing. The court found that advocacy of the toxic waste ordinance and lobbying for its enforcement against the plaintiffs were protected by the First Amendment and did not constitute unfair labor practices.[7] Concerning the Unions' grievance filing, the court noted that the grievances against ECI had been successful and that there was no contention that the provisions of the collective-bargaining agreement that the Unions sought to enforce were illegal. The court found it proper to allow further time for discovery on the claim

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[7] 692 F. Supp. 1166. The court relied on the *Noerr-Pennington* doctrine, which holds that petitioning the government does not violate the Sherman Antitrust Act, 15 U.S.C. 1 et seq., unless the petitioning is a sham – i.e., in reality an attempt to interfere directly with competitors' business relationships and not a genuine effort to influence legislation and law enforcement practices. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The court noted that Noerr-Pennington had been adapted to the labor law context in *Bill Johnson's*, in which the Supreme Court held that filing a well-founded state court lawsuit does not constitute an unfair labor practice. 692 F.Supp. at 1169. It also observed that the "sham" exception includes instituting baseless, repetitive claims in an effort to bar competitors from meaningful access to courts and administrative agencies. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). As there was no allegation that the Unions' activities were other than a genuine effort to influence legislation and law enforcement practices, or that the plaintiffs were denied meaningful access to present their own views before the Contra Costa County Board, the court found that they did not come within the sham exception to *Noerr-Pennington*. 692 F.Supp. at 1170.

relating to the Pile Drivers suit and denied without prejudice the Unions' motion to dismiss that claim.

On October 3, 1988, the plaintiffs filed an amended complaint for damages and injunctive relief. The amended complaint again alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B). It also added the allegation that the Unions' conduct violated Sections 1 and 2 of the Sherman Act, and demanded treble damages and injunctive relief.

The Unions moved for partial summary judgment, for dismissal of the amended complaint, and for sanctions. On May 1, 1989, the court granted the Unions' motion for partial summary judgment with regard to the plaintiffs' claim based on the Pile Drivers suit.[8] The court first noted that the plaintiffs had improperly sued even the Unions that were not parties to the Pile Drivers suit, and dismissed the suit against those Unions.[9] As to the remaining Unions, the court found, on the basis of discovery that had taken place since it issued the previous order, that the plaintiffs had failed to prove that the Pile Drivers suit lacked a reasonable basis in law. Although the Unions had not prevailed on the merits (the state court denied their motion for a temporary restraining order and for a preliminary injunction), the court noted that after the Pile Drivers suit was filed, the Federal Occupational Safety and Health Administration had investigated the jobsite and found a number of safety and health violations. As it found no genuine issue of material

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[8] 721 F.Supp. 239.

[9] *Id.* at 241.

fact on the issue of health and safety problems on the jobsite at the time the Unions filed their suit, the court found that the plaintiffs had offered no evidence to support a finding that the Unions' suit lacked a reasonable basis in fact and law. The court therefore dismissed the plaintiffs' claim regarding the filing of the Pile Drivers suit.[10]

Turning to the amended complaint, the court held that the plaintiffs were within their rights in filing an amended complaint, but not in restating claims on which summary judgment had already been granted. The court therefore granted the Unions' motion to strike or dismiss the amended complaint, but allowed the plaintiffs to file a revised amended complaint.

On May 22, 1989, the plaintiffs filed a second amended complaint, including allegations of all the dismissed claims, and adding a claim under the Clayton Act.[11] The plaintiffs stated that they were realleging the previously dismissed claims solely in order to preserve their right to appeal under their understanding of controlling Ninth Circuit precedent. In support of the complaint, the plaintiffs alleged a number of actions on the part of the Unions that they had not alleged in the original complaint. Those actions included

- Automatic petitioning of governmental entities for delay and harassment purposes, regardless of the merits of the petitions;

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[10] *Id.* at 241-242.

[11] 15 U.S.C. 15 and 26.

- Interfering with UPI's attempts to obtain necessary building permits;
- Instigating violent civil disorders at the UPI construction site;
- Filing and prosecuting a series of overlapping, repetitive, and sham lawsuits against the plaintiffs and others, without any reasonable expectation of success on the merits, simply to harass the defendants and to defeat the project through delay and inflation of costs;
- Making known to all interested parties that the Unions intended to file such suits and protests, but that they would withdraw and refrain from filing such actions if UPI and the Respondent would agree to use only union labor.

The Unions moved to strike or dismiss the second amended complaint and for sanctions. On August 24, 1989, the court granted the motion to strike with regard to the previously dismissed claims. It also rejected the plaintiffs' explanation for repleading the dismissed claims, and granted the Unions' motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. On November 21, 1989, the court issued an order striking specific portions of the second amended complaint. In addition to the claims concerning lobbying for the toxic waste ordinance, filing the Pile Drivers suit, and grievance filing against ECI, the stricken paragraphs included those related to automatic petitioning of governmental entities, automatic protests of permits, and interference with UPI's efforts to obtain building permits.

On March 23, 1990, UPI moved for voluntary dismissal, with prejudice, of all its claims against the Unions. On March 27, 1990, the court granted the motion.

On June 8, 1990, the district court granted the Unions' motion to limit discovery concerning the Respondent's antitrust claim.[12] The court found that the statutory labor exemption to the antitrust laws, which does not apply to concerted action or agreements between unions and "non-labor parties," would exempt the Unions' conduct from antitrust liability unless the Respondent could show both a combination with non-labor groups and an illegitimate purpose in that combination. Accordingly, the court limited discovery to the issue of whether the Unions combined with contractors, manufacturers, of other commercial entities involved in the same market for construction services as the Respondents, and whether any such combinations were for purposes other than organizing the Respondent's employees and maintaining area standards.

On July 25, 1991, the Unions moved for summary judgment on the Respondent's antitrust claim. The court granted the motion on September 5, 1991, noting that the Respondent had stated its nonopposition to the motion in light of the court's previous rulings.

In early 1992, the parties to the district court action entered into a stipulation that the Respondent's remaining claims for relief under Section 303 should be dismissed with prejudice. As part of the stipulation, the Respondent agreed to waive its right to appeal any matters contained in the claims that were not the subject of the court's previous orders.

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[12] 134 LRRM 2590, modified 136 LRRM 2647 (July 26, 1990).

On February 13, 1992, the court issued an order for the issuance of final judgment, noting that it had previously granted partial summary judgment in favor of the Unions on four of the Respondent's claims and that it had dismissed the other two claims with prejudice pursuant to the Respondent's motion for a voluntary dismissal with prejudice. The court thus ordered that final judgment should issue in favor of the Unions and against the Respondent, and that the Unions should recover their costs of the lawsuit.

The Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On July 26, 1994, the court of appeals affirmed the district court's decision granting summary judgment in favor of the Unions on the Respondent's antitrust claim.[13] The court of appeals held, however, that the district court had erred in finding that to overcome the statutory labor exemption to the antitrust laws, the Respondent had to prove both that the Unions had combined with nonlabor groups and that the combination had an illegitimate purpose. The court of appeals therefore held that the lower court had erred in limiting discovery to the former element, because the Respondent could have established an antitrust violation by proving that the Unions' actions had an illegitimate purpose, even if they were not taken in concert with nonlabor groups. The court found a strong presumption

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[13] 31 F.3d 800. Although the Respondent's original and amended notices of appeal indicated that other issues were being appealed, the court stated that the Respondent was actually appealing only the dismissal of its antitrust claims and the district court's imposition of sanctions 146 LRRM at 2962.

that some of the allegedly unlawful actions – e.g., picketing and handbilling for organizing purposes, encouraging work stoppages over safety issues – were protected from antitrust liability. "More troublesome" were the allegations that the Unions automatically protested permits sought by the Respondent, lobbied for the passage of the toxic waste ordinance and for its enforcement against the Respondent, and brought frivolous lawsuits. The court found that such conduct is not per se exempt from the antitrust laws even if engaged in [ ] pursuit of traditional union interests.

The court held, however, that the district court's error was harmless, because the Unions' actions were protected from antitrust liability under the First Amendment under the Noerr-Pennington doctrine. The court found that the Unions' conduct did not lose its protection under the "sham" exception to Noerr-Pennington. To come within the "sham" exception, the court held, the Unions' conduct must have been both objectively baseless, in the sense that no reasonable litigant could realistically expect to prevail on the merits, and intended to interfere directly with the Respondent's business relationships.[14] Because the Respondent alleged that the Unions had brought a whole series of legal actions without regard for the merits, the court found, the inquiry must be whether the actions were filed not out of a genuine interest in redressing grievances, but essentially

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[14] *See California Motor Transport, supra,* and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993).

for purposes of harassment; thus, the Respondent's allegations, if proved, would overcome the Unions' *Noerr-Pennington* defense. The court found that the Unions' conduct had not lost its protection, however, because more than half of the actions filed by the Unions had proved successful. The court was unable to reconcile that relatively high "batting average" with the Respondent's contention that the actions were filed without regard to the merits.

The court of appeals also reversed the district court's award of Rule 11 sanctions. It held that although the plaintiffs were wrong in believing that they were required to replead the dismissed claims in order to preserve those issues for appeal, their basis for that belief was not frivolous.

B. Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) by bringing a meritless suit against the Unions to enjoin them from engaging in protected concerted activity and to recover damages from them. Thus, our disposition of this case turns on the application of principles set forth in *Bill Johnson's Restaurants.*

In *Bill Johnson's,* the Supreme Court held that the Board may not enjoin the prosecution of a pending state court suit alleged to have been filed with a retaliatory motive unless the suit lacks a reasonable basis in fact and

law.[15] While acknowledging the Board's strong interest in preventing interference with protected Section 7 rights, the Court said that this interest must be balanced against two countervailing interests: The First Amendment right of access to the courts and the States' interest in protecting the health and welfare of their citizens. Thus, if the state court suit has a reasonable basis, the Board may not issue an order directing that the suit be withdrawn, but rather must stay its hand and await the results of the state court adjudication with respect to the merits of the suit.[16]

On an entirely different footing, however, are suits that have been litigated to completion, for at that point the plaintiff has had his day in court and the state's interest in providing a forum for its citizens has been vindicated.[17] If the suit has resulted in judgment in favor of the plaintiff (the Respondent in the unfair labor practice case), then the unfair labor practice complaint must be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[18] However, the Court said, if judgment has gone against the plaintiff, or the suit has been withdrawn or has been otherwise shown to be without merit, then the

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[15] 461 U.S. at 743. Exceptions to that principle, not relevant to this proceeding, are suits that are claimed to be beyond the jurisdiction of state courts because of federal preemption and suits that have objectives that are illegal under Federal law. *Id.* at 737-738 fn. 5.

[16] *Id.* at 749.

[17] *Id.* at 747.

[18] *Id.*

unfair labor practice proceeding may go forward. If the Board finds that the suit was filed with retaliatory intent, it may find a violation and order appropriate relief.[19] Moreover, the suit's having been found unmeritorious is a factor that the Board may take into account in determining whether it was filed in retaliation for the exercise of Section 7 rights.[20]

Notwithstanding the distinction clearly drawn by the Court between the standard that must be met to enjoin the prosecution of a pending lawsuit, and the standard that must be met to find an unfair labor practice once the lawsuit has been finally adjudicated, the Respondent argues that its suit cannot be deemed to lack merit if there was a reasonable basis for pursuing it. In support of this proposition, the Respondent cites the Supreme Court's holding in *Professional Real Estate Investors* that a suit cannot be deprived of antitrust immunity as a sham unless it is "objectively baseless."[21] We reject this contention. In *Bill Johnson's*, as we have stated, the Supreme Court held that the Board may not enjoin the prosecution of an allegedly retaliatory state court lawsuit unless the suit lacks a "reasonable basis." But once the suit has been adjudicated and the employer has lost, the Court continued, the Board may proceed to determine whether the suit was brought with retaliatory motive and thus violated the Act. The Board has interpreted that holding as meaning that, even if an employer had a "reasonable

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[19] *Id.* at 747, 749.

[20] *Id.* at 747.

[21] *Professional Real Estate Investors v. Columbia Pictures Industries, supra* at 60.

basis" for bringing the suit, the suit may still be found unlawful if the employer withdraws the suit or loses on the merits and the Board finds that it brought the suit out of a desire to retaliate against protected activity.[22] That principle squarely applies here.

The contention that *Professional Real Estate Investors* requires a different result has already been specifically rejected by the Ninth Circuit Court of Appeals. In *Diamond Walnut Growers v. NLRB*,[23] the court reaffirmed the distinction between pending suits, which can be enjoined only on a showing that they lack a reasonable basis, and suits that have been adjudicated adversely to the employer, which may be found unlawful if filed with retaliatory intent. The court held that *Professional Real Estate Investors* and similar cases did not alter the Supreme Court's approach to allegedly retaliatory lawsuits under Section 8(a)(1) as announced in *Bill Johnson's*. We agree with the court, and we reject the Respondent's suggestion that we revisit this settled area of the law.

Applying these principles to the circumstances of this case,[24] we note that the General Counsel issued the complaint in this case after the Respondent's suit had been

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[22] *See*, e.g., *Machinists Local 91 (United Technologies)*, 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992); *Operating Engineers Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994); *Summitville Tiles*, 300 NLRB 64, 65 and fn. 6 (1990); *Vanguard Tours*, 300 NLRB 250, 255 (1990), enf. denied in relevant part 981 F.2d 62 (2d Cir. 1992).

[23] 53 F.3d 1085 (9th Cir. 1995).

[24] Although *Bill Johnson's* involved a state court lawsuit, the Board has applied its principles to cases involving allegedly retaliatory federal court suit as well. *See*, e.g., *Grinnell Fire*

adjudicated and its appeals had run their course. The issue here, therefore, is not whether the Respondent's suit lacked a reasonable basis, but whether it lacked merit (and, if it lacked merit, whether it was filed with a motive to retaliate against the Unions for engaging in protected conduct).

1. Did the Respondent's district court lack merit?

In deciding whether the suit lacked merit, we address first the question of the deference to be accorded in this proceeding to the federal court's rulings on the merits of Respondent's suit.

The Supreme Court in *Bill Johnson's* treated the state court's final disposition of the state court suit as determinative on the question of whether the suit was meritorious. Thus, the Court explained, if the employer prevails in the state court suit and obtains judgment against the employees, he should also prevail before the Board and the complaint should be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[25] By the same token, however,

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Protection Systems Co., 328 NLRB No. 76 (1999); *BASF Wyandotte Corp.*, 278 NLRB 173, 181 and n. 26 (1986). In applying those principles here, we note that the First Amendment right of access to the courts, which concerned the Court in *Bill Johnson's*, is implicated just as strongly when the lawsuit at issue is a federal court suit as it is when the suit at issue is a state court suit.

[25] 461 U.S. at 747.

> If a judgment goes against the employer in the state court . . . or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' Sec. 7 rights.[26]

In this case, as we have noted, the Respondent sued in federal rather than state court, and its claims alleged violations of federal law rather than of state law. However, we see no reason not to regard the rulings of the federal courts here as equally determinative on the question of whether the Respondent's federal court lawsuit lacked merit for purposes of a *Bill Johnson's* analysis.

As antitrust law is primarily the concern of the federal courts and not of the Board, we do not hesitate to defer to the courts' determinations with regard to the merits of the antitrust claims in the Respondent's suit. We acknowledge that the Section 303 claims stand on somewhat different footing, inasmuch as they involve an issue over which the Board and the courts have concurrent jurisdiction; whether the Unions engaged in conduct which violates Section 8(b)(4) of the Act.[27] However,

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[26] *Id.* (emphasis added).

[27] Sec. 303 provides that

> (a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage

because the Respondent here elected to pursue its 8(b)(4) claims against the Unions in the form of a Section 303 suit in federal court rather than as an unfair labor practice charge before the Board, we think it appropriate to look to the federal courts' disposition of those claims as well as the antitrust claims as the test of whether the claims were meritorious.

a. The adjudicated claims. As we have discussed, the district court granted the Unions' motions for partial summary judgment and dismissed the Respondent's Section 303 claims based on the Unions' lobbying for passage and enforcement of the toxic waste ordinance, their prosecution of the Pile Drivers suit, and their institution of grievance and arbitration proceedings against ECI.[28] The court also granted partial summary judgment in favor of the Unions and dismissed the Respondent's antitrust claim, and the court of appeals affirmed, albeit on a different theory. Thus, with respect to those portions of the Respondent's suit that were actually adjudicated, the court rendered judgment for the Unions and against the

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> in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the . . . Act.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

[28] As noted above, the district court also struck a number of portions of the second amended complaint that were related to the claims as to which it granted partial summary judgment. We consider those stricken portions of the complaint to have been adjudicated as well as the claims themselves.

Respondent. Accordingly, those portions of the Respondent's suit were unmeritorious within the meaning of *Bill Johnson's*.

The Respondent contends, however, that its suit must be found meritorious. It argues that it actually prevailed, at least in part, because the court of appeals reversed the district court concerning both the standard to be applied in determining whether the Union's actions lost their protection under the antitrust laws and the matter of sanctions. The Respondent also urges that its suit cannot be found to be without merit because it was not objectively baseless in the sense that no reasonable litigant could realistically expect to succeed on the merits.

We reject the Respondent's contentions as lacking in merit. The first, that the court of appeals' decision vindicated important aspect of the Respondent's claims, is bereft of either logical or factual support. All of the Respondent's claims that were litigated were dismissed; judgment was entered against the Respondent and in favor of the Unions; and the Unions were awarded costs as the prevailing parties.[29] That the court of appeals agreed with the Respondent concerning certain aspects of antitrust law is beside the point, as is its holding that the Unions might been guilty of antitrust violations had they, in fact, engaged in a pattern of suit-filing without regard to the merits. The point is that the Respondent alleged that the Unions had violated the antitrust laws by engaging in such a pattern of conduct, and the court found that

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[29] Rule 54(d). Fed. R. Civ. P. provides for the award of costs to the prevailing party in a civil action.

they had not. That it reached that conclusion on a different theory from that of the district court is irrelevant.

The Respondent also argues that it prevailed in part because the court of appeals' ruling will dissuade the Unions from engaging in unlawful conduct in the future. That argument, however, is both speculative and irrelevant to the issue of which party prevailed in the district court action. To "prevail" in litigation, a party must do more than obtain a ruling from the court as to what the law is. The party must also persuade the court that the law, as applied to the facts in the case, compels judgment in its favor on at least some point.[30] in that respect, the Respondent failed at every turn.

Equally unavailing is the Respondent's contention that it "prevailed" in part because the court of appeals reversed the district court's award of sanctions. The court in no sense endorsed the merits of the Respondent's suit. Indeed, its ruling in this regard concerned only the consequences to the Respondent of pursuing an unmeritorious suit. The court simply found that, having lost on the merits regarding certain of its claims, the Respondent did not act frivolously by repleading those claims in the belief that it had to do so in order to preserve those issues for appeal. In no way can this ruling on a procedural

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[30] *See City of Chanute, Kansas v. Williams Natural Gas Co.*, 31 F.3d 1041, 1048-1049 (10th Cir. 1994), cert. denied 513 U.S. 1191 (1995) (cities were not "substantially prevailing parties" for purposes of Clayton Act, despite court's having originally granted preliminary injunction against pipeline and cities having later entered into stipulation agreement with pipelines granting certain rights to cities, where cities' antitrust claims were fully adjudicated on the merits and rejected.)

issue be read as supporting the Respondent's present contention that its suit had substantive merit.

b. The voluntarily dismissed claims. Not [ ] all the Respondent's claims were submitted to the courts for a decision on the merits. Some, alleging (inter alia) unlawful picketing, encouraging employees to engage in secondary strikes, and violence, were voluntarily withdrawn and dismissed with prejudice.

In *Bill Johnson's*, the Supreme Court indicated that the withdrawal of a claim could be regarded as equivalent to an showing that it lacks merit:

If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case.[31]

Further, under Rule 41 of the Federal Rules of Civil Procedure, dismissal of a complaint with prejudice at the plaintiff's request acts as a complete adjudication. Unless otherwise provided for by the court, such a dismissal is subject to the rules of res judicata and is binding on the parties and their privies.[32] Accordingly we find that these claims that the Respondent voluntarily withdrew

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[31] 461 U.S. at 747 (emphasis added).

[32] Wright and Miller, Federal Practice and Procedure, Civil 2d, Secs. 2364, 2367, 2373.

with prejudice were, for *Bill Johnson's* purposes, unmeritorious.[33]

2. Was the Unions' conduct protected by Section 7?

Although the courts dismissed most of the Respondent's claims against the Unions, the fact that those claims were dismissed does not in and of itself mean that the Union's actions were necessarily protected by Section 7. Some kinds of lawful concerted conduct do not enjoy the protection of the Act.[34] Before we can determine whether the Respondent's suit violated the Act, then, we must determine whether the Unions' actions were affirmatively protected by Section 7.

Can Union conduct ever be protected?

The Respondent contends that the conduct in question was unprotected because it was engaged in by the

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[33] In *Vanguard Tours*, 300 NLRB at 255, the Board declined to read the Supreme Court's statement in *Bill Johnson's* as suggesting that the withdrawal of a lawsuit is in all circumstances equivalent to a showing of lacks of merit. The Board found, under the circumstances presented in *Vanguard Tours*, that the employer's withdrawal of its suit was presumptively an admission that the suit lacked merit, and that the employer had failed to rebut the presumption. In *Vanguard Tours*, however, unlike this case, there was no indication that the employer had withdrawn its suit with prejudice. We find the employer's voluntary withdrawal of its claim with prejudice to be an admission that the claims lacked merit.

[34] E.g. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953) (disloyalty disparaging employer's product).

Unions, rather than by employees. The Respondent's premise is that only employees – not unions – have Section 7 rights, and thus that its suit could not violate Section 8(a)(1) because it was not in retaliation against employee protected activity. The Respondent relies on *Lechmere, Inc. v. NLRB*,[35] in which the Supreme Court stated that "the NLRA confers rights only on employees, not on unions or their nonemployee organizers."[36] The Respondent also reasons that, because the Unions did not represent its employees, their actions were unprotected. We find no merit to either contention.

To begin with, we do not read the Supreme Court's language quoted above in as sweeping a fashion as the Respondent urges. *Lechmere* was concerned with one narrow aspect of union activity – the attempt by union organizers who were not employees of the respondent employer to engage in organizing activity on that employer's private property. The Court reaffirmed its earlier holding in *NLRB v. Babcock & Willcox Co.*,[37] which distinguished between the Section 7 right of employees of the employer to engage in self-organizational activity on the employer's property and the (must more restricted) right of nonemployee organizers, to whom the Court held that Section 7 applies "only derivatively," to engage in trespassory activities on the same property.[38] The Court noted its holding in Babcock that an employer may have to allow nonemployee organizers on its property if the

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[35] 502 U.S. 527 (1992).

[36] *Id.* at 532 (emphasis in original).

[37] 351 U.S. 105 (1956).

[38] 502 U.S. at 533.

union has no reasonable alternative means of reaching the employees with its message.[39] The Court also did not question the exception to the general rule set forth in *Babcock & Wilcox* that an employer may not discriminate against unions in denying access to its property.[40] In our view, the Court's reaffirmance in *Lechmere* of the right of nonemployee union organizers to gain access to an employer's property if no reasonable alternative means of reaching the employees exist, together with its failure to question the proposition that employers may not discriminatorily deny unions access to their property, negate any suggestion that the Court intended to hold that union conduct is never protected by the Act.

Our confidence in this reading of *Lechmere* is bolstered by the language and purpose of the Act itself. Section 1 sets forth the Act's raison d'etre:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargain and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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[39] 502 U.S. at 533-534, citing *Babcock*, 351 U.S. at 112.

[40] 351 U.S. at 112.

To those sends, Section 7 provides that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

The Act thus unequivocally assures employees of the right to join unions and to engage in "other concerned activities" for "other mutual aid or protection." It would be a curious and myopic reading of these core provisions of the Act to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid or protection," the conduct of the unions they form and join for those purposes is not protected by the Act. Under that reasoning, conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf. We decline the Respondent's invitation to read the Act in such a perverse way.

The Respondent's contention is also contrary to Board and court precedent. In *Diamond Walnut Growers*,[41] both the Board and the court of appeals found that the employer violated Section 8(a)(1) by bringing a meritless libel suit against the union with retaliatory motive. The employer argued that it could not have violated Section 8(a)(1) because it sued only the union, not individual employees. Both the Board and the court squarely rejected that argument. The Board affirmed the decision of the administrative law judge, who held that "for the

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[41] 312 NLRB 61 (1993), enfd. 53 F.3d at 1085 (9th Cir. 1995).

Board to find an unfair labor practice pursuant to a *Bill Johnson's Restaurants* analysis, it is not necessary for the plaintiff/respondent to sue employees in state court nor to sue a union and employees. It is sufficient to sue a union only as in this case."[42]

Likewise, in *Dahl Fish Co.*,[43] the Board adopted the administrative law judge's finding that the employer violated Section 8(a)(1) by filing suit against the union in retaliation for the unions' filing a Board charge. The judge specifically found the acts of the union and its agents protected in those circumstances. A contrary holding, she reasoned, would abrogate the advantages of concerted activity the Act was designed to protect by imposing on the employees the burden of filing charges to gain such protection. The employees would then be subjected to the dangers of lawsuits with their attendant costs, which could convince them to forgo their Section 7 rights to file charges. Thus, I find that the Union is protected by Section 8(a)(1) in these circumstances. To hold otherwise would destroy the equilibrium the Act was designed to establish and would divest the employees of the advantages gained by their decision to organize and to be represented by the single voice of the Union.[44]

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[42] 312 NLRB at 69 (emphasis added).

[43] 279 NLRB 1084, 1110-1111 (1986), enfd. mem. 819 F.2d 1254 (D.C. Cir. 1987).

[44] 279 NLRB at 1111.

The identical reasoning applies here.[45]

The Respondent argues, however, that *Diamond Walnut* is distinguishable because there the union represented the employees of the employer who filed the suit, and because those employees were engaged in a strike. The Respondent notes that the court of appeals found that the suit drained the union's resources and inevitably interfered with the employees' exercise of their Section 7 right to strike. Because its employees were not represented by the Unions and did not engage in a strike or other protected activity, the Respondent contends that its suit did not interfere with their exercise of Section 7 rights, and therefore was not unlawful.

We disagree. Although the employees in *Diamond Walnut* and *Dahl Fish* sued the unions that represented their employees and that were helping those employees to exercise their Section 7 rights, those are not the only circumstances in which an employer's suit against a union may interfere with the exercise of employees' rights. In the first place, employees of employers other than the Respondent have Section 7 rights, and some of them form or join unions in order to advance those rights. Even if those individuals' interests are not congruent with, or are even antithetical to, the interests of the Respondent's employees, their concerted pursuit of those interests, through unions or otherwise, is protected by Section 7 except under circumstances not shown to exist here. And the Respondent cannot lawfully interfere with

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[45] *See* also *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1377 (7th Cir. 1997).

those employees' exercise of their Section 7 rights merely because it does not employ them. It is well established that an employer violates the Act by interfering with the exercise of Section 7 rights of employees of other employers, or by causing other employers to discriminate against their employees because of their union or other protected concerted activities.[46] Thus, assuming that the actions of the Unions on behalf of the employees they represented were otherwise protected, they did not lose their protected character vis-a-vis the Respondent merely because the employees represented by the Unions were not the Respondent's employees. As the Supreme Court noted in *Easter, Inc. v. NLRB*,[47] the employees whose concerted activities may be protected under Section 7 are defined by Section 2(3) to include any employees, not just those of any particular employer.[48]

For all the foregoing reasons, we find that the Respondent's suit is not immune from Section 8(a)(1) liability merely because it was filed against the Unions, rather than against employees, or because the Unions did not represent the Respondent's employees.

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[46] *See*, e.g., *Dews Construction Corp.*, 231 NLRB 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978); *International Shipping Assn.*, 297 NLRB 1059 (1990).

[47] 437 U.S. 556 (1978).

[48] *Id.* at 564. *See* also *O'Neil's Markers v. NLRB*, 95 F.3d 733 (1996), in which the court of appeals, citing *Eastex*, agreed with the Board that union area standards handbilling is protected by Sec. 7, *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978).

Was the Unions' Actual Conduct Protected?

The Respondent also contends that, whether or not union activity in the abstract can be protected by Section 7, the Unions' conduct here was not protected. The Respondent relies in part on a complaint (later settled) against *Cement Masons Local 825*, alleging violence and rioting that assertedly was part of the conduct alleged to be unlawful in the Respondent's suit.[49] It also cites a General Counsel's advice memorandum which analyzed assertedly indistinguishable conduct in a different case by another union and found it unprotected.[50]

a. The adjudicated claims. We consider first the conduct that was the subject of the Respondent's claims that were dismissed on the merits by the district court – i.e., the Unions' legislative lobbying, suit filing, and instituting grievance and arbitration proceedings. We note initially that each of those courses of action concerned conditions of employment, and thus normally would be protected by Section 7 if engaged in by employees.[51]

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[49] Case 32-CB-2787.

[50] Tame T.I.C., Cases 27-CC-826 et al.

We reject at the outset the Respondent's contention that either the issuance of a complaint against *Cement Masons Local 825* or the advice memorandum in Tame T.I.C., compels a finding that any of the Unions' alleged conduct was unprotected. Neither action by the General Counsel constituted a decision on the merits.

[51] In *Eastex*, the Supreme Court held that Sec. 7 protects employees who seek to improve working conditions by resorting to administrative and judicial form and who appeal to legislators to protect their interests as employees. 437 U.S. at 566. *See* also e.g., *Summitville Tiles*, 300 NLRB at 65 (suits filed by

Because concerted activity is not unprotected simply because it is engaged in by unions, we find that those actions on the part of the Unions were presumptively protected.

The Respondent argues that the Unions' conduct was unprotected because it was engaged in with an unlawful secondary objective. The Respondent brought the identical claims to the district court, however, and lost. The court rejected the Respondent's contention that each of those actions violated Section 8(b)(4) and dismissed its claims based on those contentions. The Respondent did not appeal the dismissals. As we have observed, it is possible for conduct to be lawful but not protected by Section 7. But the Respondent argued to the court that the Unions' conduct was unlawful for the same reason it now argues that that conduct was unprotected – i.e., because it allegedly had an unlawful secondary object. Having litigated this very issue unsuccessfully before the courts, and having failed to file a charge with the Board, the Respondent will not now be heard to argue that the Unions' conduct was unprotected.

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employees found protected); *Altex Ready Mixed Concrete*, 223 NLRB 696, 700 (1976), enfd. 542 F.2d 295 (5th Cir. 1976) (union filing sent against employer for contract violation, protected); *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1384-1385 (9th Cir. 1976) (lobbying U.S. senators and congressmen concerning immigration laws, protected) (*Wray Electric Contracting*, 210 NLRB 757, 762 (filing OSHA complaint found protected); *Miami Systems Corp.*, 320 NLRB 71, 77 (1995), revd. in part on other grounds 111 F.3d 1284 (6th Cir. 1997) (pursuing grievance to arbitration, protected).

We note in particular that the district court held that the Unions' filing and processing of meritorious grievances to enforce lawful contract provisions could not violate Section 8(b)(4).[52] The court cited *Truck Drivers Union Local 705 v. NLRB*,[53] in which the D.C. Circuit, in reaching that result, disagreed with the Board. The Board had held that, assuming that *Bill Johnson's* applies to grievance processing, even the processing of a meritorious grievance could violate Section 8(b)(4) if done with a secondary objective.[54] The Board has since indicated, however, in agreement with the D.C. Circuit, that the processing of a meritorious grievance does not violate Section 8(b)(4) unless the grievance seeks to enforce an unlawful contract clause, and has endorsed the court's distinction between illegal objective and retaliatory motive.[55]

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[52] It also held that the Unions' lobbying activities did not run afoul of Sec. 8(b)(4). Its decision was cited with evident approval in *Brown & Root v. Louisiana State AFL-CIO*, 10 F.3d 318 (1994), in which the Fifth Circuit clearly indicated that to find governmental lobbying to constitute "coercion" within the meaning of Sec. 8(b)(4)(B) would pose potentially serious First Amendment problems.

[53] 820 F.2d 448 (1987).

[54] *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304 (1986). The Board held that the union's grievance in that case had an unlawful secondary objective and therefore came within the exception mentioned in fn. 5 of *Bill Johnson's* for suits filed with an unlawful objective.

[55] *See Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990), citing the D.C. Circuit's decision in *Truck Drivers Union Local 705, supra; Teamsters Local 776 (Rite Aid)*. 305 NLRB 832 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

Because it failed to convince the court that the Unions' lobbying, suit filing, or grievance processing violated either Section 8(b)(4) or the antitrust laws, and has suggested no other reason why that otherwise protected conduct should be found to have lost its protected character, we find that the Respondent has failed to rebut the presumption that the Unions' conduct was protected.[56]

b. The voluntarily dismissed claims. The Respondent also contends that the Unions engaged, in unprotected acts of picketing, handbilling, violence, and other conduct that was not addressed on the merits by the court, but was the subject of claims that were voluntarily dismissed with prejudice at the Respondent's request. Thus, the court made no findings as to whether

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[56] Contrary to the General Counsel and the Unions, we find that the Respondent is not barred by Sec. 10(b) of the Act from contending that the Unions' conduct was unprotected. Sec. 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charged.)" That provision has been interpreted by the Board also to preclude raising, as a defense to a complaint allegation, conduct as to which Sec. 10(b) would bar a complaint if it were alleged as an unfair labor practice. *See*, e.g., *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989), enfd. mem. 943 F.2d 52 (6th Cir. 1991). cert. denied 504 U.S. 909 (1992). We find that principle inapplicable in the kind of *Bill Johnson's* setting presented here, where the General Counsel, in establishing a violation of Sec. 8(a)(1), must show that the Unions' allegedly secondary activity which occurred outside the 10(b) period, was protected. Because of this required showing, the Respondent cannot be precluded from asserting facts otherwise barred by 10(b) in countering the General Counsel's case.

the Unions engaged in the conduct alleged and, if so, whether the conduct was lawful.

We find it unnecessary to decide whether those alleged actions, if engaged in, were protected. We have already found that the Unions' lobbying, grievance filing and processing, and lawsuit filing were protected activities. If, then, the Respondent filed its suit in an attempt to retaliate against the Unions for engaging in those protected actions, and the suit was unmeritorious, the suit was unlawful, regardless of whether it was also targeted at activities that were not protected. Accordingly, in our view, whether the conduct alleged in the voluntarily dismissed claims was or was not protected by Section 7 is irrelevant.

3. Was the Respondent's lawsuit unlawfully motivated?

For the reasons discussed above, we have found that the Respondent's suit lacked merit and that the Unions' conduct that was the target of the suit was protected by Section 7. In order to find that the Respondent violated Section 8(a)(1), however, we must find that it either filed or maintained its suit against the Unions in retaliation against protected conduct. We find, on the basis of the following evidence, that the Respondent's suit had a retaliatory motive.

First, the Respondent's suit was, by its terms, directed at protected conduct. The complaint allegations in that action expressly listed lobbying, suit filing, and grievance filing as purportedly unlawful. As we have found, each of those forms of conduct was protected.

Since the suit was aimed directly at protected activity, and necessarily tended to discourage similar protected activity, it was, by definition, retaliatory within the meaning of *Bill Johnson's*.[57] Indeed, the Respondent as much as admits a retaliatory motive. In its answering brief, the Respondent states that it "filed its litigation in order to stop certain Union conduct which it believed to be unprotected by the Act, and that after the suit, the activity stopped." Clearer evidence of retaliatory motive could hardly be found.[58]

Moreover, in alleging that the *Piledrivers* suit was unlawful, the Respondent charged not only the Unions that were parties to that suit but also some that were not. The district court sensibly ruled that "the non-party defendants cannot be held liable for an action based on the filing of a lawsuit to which they were not parties," and dismissed the suit against the nonparty unions. This pursuit of an action against several unions that were not even parties to the *Piledrivers* litigation indicates that the Respondent was interested only in harassing the Unions,

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[57] *H.W. Barss Co.*, 296 NLRB 1286, 1287 (1989); *Phoenix Newspapers*, 294 NLRB 47, 50 (1989).

[58] In his affidavit, the Respondent's counsel avers that the Respondent filed its suit against the Unions to preserve its business from what it reasonably believed to be unlawful activities by the Unions. The courts, however, found that most of the Unions' activities were not unlawful and dismissed with prejudice the claims concerning the remaining activities. The Respondent's mistaken belief that the Unions' actions were unlawful, even assuming that it had a reasonable basis and was held in good faith, is not a defense to a finding that its suit was unlawful if, as we find, the suit lacked merit and was filed with a retaliatory motive. *See Phoenix Newspapers*, 294 NLRB at 49-50.

not in obtaining justice, and is additional evidence that it filed and maintained its suit with a retaliatory motive.

The reception the Respondent's suit received at the hands of the federal courts is still further evidence of retaliatory motive. The Supreme Court in *Bill Johnson's* held that, when an employer's suit is found unmeritorious, "the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' Section 7 rights."[59] We do so here and find that the utter absence of merit to the Respondent's Section 303 claims that were dismissed on motions for summary judgement indicates a retaliatory motive on the part of the Respondent which brought them.

4. Are portions of the complaint barred by Section 10(b)?

The charges filed by all the Unions except Steamfitters Local 342 and IBEW Local 302 were filed on May 20, 1992, more than four years after the Respondent initiated its civil suit. The Respondent contends that the complaint allegations based on the 1992 charges were untimely filed under Section 10(b).

We find no merit in that contention. The Board has held that the General Counsel may add allegations to the complaint outside the 6-month 10(b) period if they are closely related to the allegations of a timely filed charge and are based on conduct that occurred during the 10(b)

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[59] 461 U.S. at 747.

period.[60] Allegations are "closely related" if (1) they arise from the same factual situation as those of the timely filed charge, (2) they involve the same legal theory, and usually the same section of the Act, and (3) the respondent would raise the same or similar defenses to both allegations.[61]

The Respondent concedes that the charges filed in 1988 by Steamfitters Local 342 and IBEW Local 302 were timely filed. And we find that the allegations of the 1992 charges are closely related to the earlier charges. Thus, both sets of charges arise from the same factual situation (the Respondent's lawsuit against all the Unions), involve the same legal theory (a violation of Section 8(a)(1) under *Bill Johnson's*), and have elicited identical defenses from the Respondent. As the 1992 charges were based on conduct that took place during the 10(b) period, we find that the allegations based on those charges are not time-barred.[62]

C. Conclusions of Law

For all the reasons discussed above, we find that the Respondent's lawsuit against the Unions lacked merit, that the Unions' conduct that was the target of the suit was protected by Section 7, and that the Respondent filed

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[60] *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988).

[61] *Id.* at 1118.

[62] We therefore need not address the Unions' contention that the allegations based on the 1992 charges are not barred by Sec. 10(b) because the Unions were not aware that the Respondent's suit lacked merit until the district court dismissed it.

and maintained its suit out of a desire to retaliate against the unions for engaging in protected concerted activity. We therefore find that the suit violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reimburse the Unions for all legal and other expenses, including attorneys' fees, incurred in defending against the Respondent's lawsuit, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835-836 and fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992). cert denied 507 U.S. 959 (1993).

Concerning the award of attorneys' fees, we note that the Board has consistently found it appropriate to order employers to reimburse both employees and unions for legal expenses, including attorneys' fees, incurred in defending unlawful suits by employers.[63] Indeed, the Supreme Court in *Bill Johnson's* expressly stated: "If a violation is found, the Board may order the employer to

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[63] *See*, e.g., Diamond Walnut Growers, 312 NLRB at 71; *Geske & Sons, Inc.*, 317 NLRB 28, 30 58-59 (1995), enfd. 103 F.3d 1366, 1378-1379 (7th Cir. 1997); *Phoenix Newspapers*, 294 NLRB at 51; *H.W. Barss Co.*, 296 NLRB at 1288; *Summitville Tiles*, 300 NLRB at 67.

reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses."[64]

The Respondent contends, however, that an award of attorney's fees to the Unions is foreclosed in this case. It argues that the Court in *Bill Johnson's* authorized such awards only for employees, not for unions. It also contends that attorneys' fees may be awarded in Board cases only to discourage frivolous litigation, and that its suit, even if unmeritorious, was not frivolous.[65] We find neither argument persuasive.

Although the Respondent correctly points out that the Supreme Court in *Bill Johnson's* expressly endorsed awards of attorneys' fees only to employees, we believe that the reason was that the Court was addressing only the case before it, in which the employer had sued employees, not a union. We find nothing in the Court's opinion to suggest that its reasoning was meant to apply only to suits against employees and, like the Seventh Circuit, we decline to draw by negative implication the inference urged by the Respondent.[66] Rather, we agree with the Seventh Circuit's observations in the course of affirming an award of legal expenses:

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[64] 161 U.S. at 747.

[65] The Respondent relies on the Sixth Circuit's decision in *Johnson and Hardin Co. v. NLRB*, 49 F.3d 237 (1995), in which the court of appeals relied on both of those theories in denying enforcement to pertinent provisions of the Board's order. With all due respect to the court, we disagree with its decision for the reasons discussed in text below.

[66] *Geske & Sons, Inc. v. NLRB*, 103 F.3d at 1378.

> The injured party, the Union that plays a necessary part in the organizational activities of the employees, is compensated for expenses that it would not have incurred in the absence of the baseless state law suit. An adequate deterrent to unlawful attempts by employers to hinder organizational attempts by unions is provided. A baseless and retaliatory lawsuit against a union can be a powerful weapon in the hands of an unprincipled employer. Such an employer need not win its lawsuit against a union to thwart the Union's attempts to organize workers; rather, the employer need only impose substantial costs and delays upon the Union. The Board's remedies in the face of such a potential abuse must include an economic disincentive for engaging in such conduct.[67]

The Respondent's argument that it is inappropriate to award attorneys' fees unless a party has engaged in frivolous litigation is also wide of the mark. We do not award attorneys' fees in *Bill Johnson's* cases because employers' suits are frivolous. We award them because the suits are unlawful; they themselves constitute the unfair labor practices for which a remedy must be provided.[68] As the court of appeals correctly observed in

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[67] *Id.* at 1379.

[68] *See SEIU Local 32 B-32J v. NLRB*, 68 F.3d 490, 496 (D.C. Cir. 1995) (enforcing Board's award of attorneys' fees against union that violated Sec. 8(b)(4)(B) by unlawfully demanding arbitration). *Lang Towing, Inc.*, 201 NLRB 629 (1973), and *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), enfd. as modified sub nom. *Electrical, Radio & Machine Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), cert. denied 417 U.S. 921 (1974), cited by the Respondent, are inapposite to this case. Neither of those decisions involved lawsuits that themselves violated the Act.

Geske & Sons, the Unions would not have incurred those attorneys' fees except for the Respondent's meritless lawsuit, and it is both appropriate and necessary to order that they be made whole and to provide an economic disincentive for engaging in similar unlawful conduct.

ORDER

The National Labor Relations Board orders that the Respondent, BE & K Construction Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Filing and prosecuting lawsuits with causes of actin against the Unions that are without legal merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Reimburse the Unions for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the manner set forth in the Remedy section of this decision.

   (b) Within 14 days after service by the Region, post at its facilities in Birmingham, Alabama and Contra Costa

County, California copies of the attached notice marked "Appendix."[69] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, as its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 21, 1987.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[69] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the Respondent's cross-motion for summary judgment is denied.

Dated, Washington, D.C. September 30, 1999

John C. Truesdale, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT file and prosecute lawsuits with causes of action against the Unions that are without legal

merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Unions for all legal and other expenses incurred in the defense of our lawsuit, with interest.

BE & K CONSTRUCTION COMPANY